

(24,427)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 683.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF
IN ERROR,

v/s.

KEYSTONE ELEVATOR AND WAREHOUSE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

INDEX.

| | Original. Print |
|--|-----------------|
| Transcript from the court of common pleas, No. 5, of Philadelphia county | 1 1 |
| Docket entries | 1 1 |
| Præcipe for summons..... | 2 1 |
| Summons in assumpſit..... | 3 2 |
| Order for appearance..... | 5 2 |
| Statement of claim..... | 6 3 |
| Affidavit of defense—deposition of George D. Dixon..... | 13 11 |
| Rule to plead..... | 14 11 |
| Plea | 15 13 |
| Agreement to refer..... | 16 13 |
| Acceptance of appointment and oath as referee..... | 17 13 |
| Referee's report | 18 15 |
| Findings of fact..... | 36 33 |
| Conclusions of law..... | 39 36 |
| Exceptions of Pennsylvania R. R. Co. to report..... | 40 37 |

INDEX.

| | Original. | Print |
|---|-----------|-------|
| Testimony of Samuel Bell, Jr. | 47 | 44 |
| Jacob Michel | 54 | 51 |
| Richard M. Richardson | 58 | 55 |
| Harvey C. Miller | 61 | 58 |
| Robert Clinton Wright | 72 | 69 |
| Walter F. Sims | 86 | 83 |
| Stipulation as to statements | 95 | 92 |
| Testimony of Harvey C. Miller (recalled) | 97 | 94 |
| Robert Clinton Wright (recalled) | 115 | 112 |
| Harvey C. Miller (recalled) | 119 | 116 |
| Carroll M. Bunting | 122 | 119 |
| Robert Clinton Wright (recalled) | 131 | 128 |
| Harvey C. Miller (recalled) | 132 | 129 |
| Exhibit A—Statement, I. C. C., G. No. 2953 | 136 | 133 |
| Opinion of the court | 138 | 135 |
| Order for judgment and assessment of damages | 140 | 136 |
| Docket entries | 141 | 136 |
| Appeal and affidavit | 142 | 137 |
| Writ of certiorari | 143 | 138 |
| Assignments of error | 145 | 139 |
| Judgment | 152 | 142 |
| Clerk's certificate | 152 | 142 |
| Writ of error | 153 | 143 |
| Citation and service | 155 | 144 |
| Bond on writ of error | 156 | 144 |
| Prayer for reversal of judgment | 157 | 145 |
| Assignments of error | 158 | 146 |
| Stipulation as to record | 164 | 150 |
| Judge's certificate to clerk | 165 | 151 |
| Clerk's certificate to judge | 165 | 151 |
| Clerk's certificate | 166 | 151 |

1 *Copy of Docket Entries.*

Abstract of the Record, Showing the Question Presented for the Decision of the Court and How Disposed of.

II. Copy of Docket Entries.

M. Hampton Todd, John Hampton Barnes.

April 8, '11.—Statement and rule to file aff't of defence filed.

May 5, '11.—Aff't of defence filed.

May 6, '11.—Rule to plead filed.

May 9, '11.—Plea filed.

June 21, '11.—Acceptance of appointment as referee and oath filed.

Feb. 10, 1914.—Referee's report with exceptions and disposition of same and testimony filed showing that there is due and owing by the def't to the pl'tff the sum of 17,507.04 with int. thereon from Jan'y 24, 1911, filed.

Eo die.—Referee's bill filed.

Summons Assumpsit.

Exit April 1, 1911.

Ret. 1st Monday April, 1911.

Served April 3, 1911.

Feb. 21, 1914.—Exceptions dismissed.

Report of Referee confirmed.

Eo die.—Opinion filed.

March 5, 1914.—Judgment in the amount 20,827.27 the exceptions to the Report having been dismissed.

March 5, 1914.—Damages ass'd at 20,827.27.

March 12, 1914.—Certiorari from Supreme Court of Jan'y T., 1914, No. 123, &c., brought into office.

Eo die.—Appeal Bond filed.

2 C. P. No. 5, March Term, 1911.

No. —.

KEYSTONE ELEVATOR AND WAREHOUSE COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

To the Prothonotary:

Issue summons assumpsit as above. Returnable first Monday of April, 1911.

M. HAMPTON TODD,
Attorney for Plaintiff.

Erskine, April 1st, 1911.

Endorsement: No. 2319 March Term 1911—C. P. No. 5—Keystone Elevator and Warehouse Company vs. Pennsylvania Railroad Company—Præcipe for summons. Filed Apr. 1-1911 Hunter Pro Proth'y.—Todd.

COUNTY OF PHILADELPHIA, ss:

The Commonwealth of Pennsylvania to the Sheriff of the County of Philadelphia, Greeting:

[SEAL.]

We command you that you summon Pennsylvania Railroad Company late of your County, so that it be and appear before our Judges, at Philadelphia, at our Court of Common Pleas, No. 5 of the County of Philadelphia, to be holden at Philadelphia, in and for the said County on the first Monday of April next, there to answer Keystone Elevator and Warehouse Company of a plea of Assumpsit And to have you then and there this writ.

Witness the Honorable J. Willis Martin President of our said Court, at Philadelphia, the 1st day of April in the year of our Lord, one thousand nine hundred and eleven (1911).

J. U. L. HUNTER,
Prothonotary.

Served the Pennsylvania Railroad Company the within named defendant company by handing April 3rd 1911 personally a true and attested copy of the within writ to G. A. Walker the Asst. Treasurer of said defendant company, in the County of Philadelphia, State of Pennsylvania.

So answers,

GEORGE H. RATIN,
Deputy Sheriff.
JOSEPH GILFILLAN,
Sheriff.

4 Endorsement: 2319 March Term, 1911—Court of Common Pleas, No. 5—Keystone Elevator and Warehouse Company vs. Pennsylvania Railroad Company—Summons. Assumpsit—M. Hampton Todd. Sheriff's Appearance Docket 24998 4-3-11—G. A. Walker Asst. Treas.—Leedin.

5 Common Pleas No. 5, March Term, 1911.

No. 2319.

KEYSTONE ELEVATOR & WAREHOUSE CO.
vs.
PENNSYLVANIA RAILROAD COMPANY.

Enter my appearance in this case for the defendant.

JOHN HAMPTON BARNES,
JOHN HAMPTON BARNES,
Attorney for Defendant.

Franklin Bank Building, April 5th, 1911.
To the Prothonotary Common Pleas.

Endorsement: No. 2319, March Term, 1911—Common Pleas, No. 5—Keystone Elevator & Warehouse Company, vs. Pennsylvania Railroad Company—Order for Appearance—Filed Apr. 5 1911—Browning Pro Proth'y.—John Hampton Barnes.

Statement of Claim

STATEMENT OF CLAIM

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA }
ss:

The plaintiff, the Keystone Elevator and Warehouse Company, claims to recover from the defendant, The Pennsylvania Railroad Company, the sum of Seventeen thousand five hundred fifty-one dollars and four cents (\$17,551.04) with interest thereon from January 24th, 1911, upon a cause of action of which the following is a statement.

On to-wit, March 1st, 1909, at the County aforesaid, the defendant rented by oral agreement to the plaintiff for the term of at will the elevator and warehouse owned by it and located on the line of its railroad at the southeast corner of Clearfield street and Park avenue, in the City of Philadelphia, County aforesaid, at the annual rental of Six thousand dollars, payable in equal quarterly payments, which rent the defendant agreed to pay.

And thereupon, on to-wit, the day and year aforesaid, at the County aforesaid, it was further orally agreed between the plaintiff and the defendant that the defendant would do the necessary shifting to enable cars to reach the elevator and warehouse aforesaid for the purpose of taking from and delivering to the same all freight shipped therefrom or destined thereto and should and would take and deliver the same over its lines at the same rates, except in case of traffic hauled short distances upon which it was customary for the defendant to apply rates varying with respect to different station deliveries in the City of Philadelphia, in the same manner and with the same promptness that it delivered and received traffic at any other terminal point controlled by it in the City of Philadelphia.

And at the same time and place it was further agreed between the said parties that the defendant would move, free of charge, from the elevator aforesaid to its water front terminals all grain received over its lines after receiving

treatment at said elevator and would move free of charge from the export elevators on its lines in Philadelphia to the elevator of the plaintiff, as aforesaid, all shipments of rejected grain, provided, however, that the plaintiff was not to receive any compensation from the defendant for any services rendered on shipments of said rejected grain.

And the plaintiff, on its part, agreed to use all reasonable efforts to secure to the lines owned, leased, controlled and operated by the defendant all traffic controlled by it or destined to or from the elevator and warehouse aforesaid, and that the traffic passing over said lines should at all times have the preference in the use of the facilities furnished by the plaintiff over traffic passing over other lines, and that without the consent of the defendant the said facilities should not be extended to traffic passing over other lines, and the plaintiff further agreed to furnish at its own cost all manual labor that should be required to promptly load and unload the cars of the defendant at the elevator and warehouse aforesaid and to handle promptly and effectively all traffic delivered to it by the defendant and to pay all running and operating expenses of said elevator and warehouse.

The plaintiff further agreed to act free of charge as the agent of the defendant for the collection of freight and charges upon all such traffic as should be transported to and delivered at said elevator and warehouse as aforesaid, and that such delivery at said elevator and warehouse was not intended to be a relinquishment of possession of such traffic or a lien for freight or charges by the defendant, but such possession was to be held by the plaintiff acting as agent for the defendant for the enforcement of such lien and of all other rights of the defendant; and the plaintiff further agreed to protect and indemnify the defendant from all manner of liability on account of any acts of omission or commission on the part of the plaintiff in respect to the grain and merchandise received by it at said elevator and

Statement of Claim

warehouse and also from all manner of liability on account of receipts for grain and merchandise issued by it.

And the said plaintiff further agreed with the defendant to keep all property contained in said elevator and warehouse for which the defendant might be held responsible properly insured against fire for the benefit of all parties who should have an interest therein, and it further agreed to perform the general duties incident to such agency.

And in consideration of the performance of the foregoing agreement on the part of the plaintiff to be kept and performed, the said defendant agreed with the plaintiff to pay it a just and reasonable sum for each ton of grain and merchandise handled by it through said elevator and warehouse except that no payment was to be made upon traffic for the movement of which the said defendant should only receive a switching rate. And the said defendant further agreed that in addition to such amount to be paid by it to the plaintiff, the plaintiff should have the right to charge the public, consignee, shipper or owner of the traffic reasonable and customary rates for the services performed or facilities furnished, but such charges so made should be subject to the approval of said defendant.

And it was further agreed between said parties that said agreement should remain in force and binding upon both until either party gave the other notice of a desire to terminate the same, whereupon it was to absolutely cease and end.

And the said plaintiff says that relying upon the said promise and undertaking of the defendant that it would pay the plaintiff at the end of each month a reasonable and just compensation for the performance and keeping of the terms and conditions of said agreement on its part to be kept and performed, it on to-wit, March 1st, 1909 at the County aforesaid, entered upon the performance thereof and faithfully kept and performed all the terms of said agreement on its part to be kept and performed until the thirtieth day of April 1910, when the said agreement was

Statement of Claim

terminated and ended by mutual agreement between the said parties plaintiff and defendant. And the said plaintiff says that the reasonable and just value of its performance of the terms and conditions of said agreement on its part so kept and performed as aforesaid, and the services rendered to and benefits conferred on the defendant thereby from March 1st, 1909 to April 30th, 1910, is thirty-five cents per ton for each ton of grain and other merchandise handled by it through said elevator and warehouse upon which, under the terms of said agreement, it was entitled to compensation; and the said plaintiff further says that in the performance of said agreement it actually handled at the times and in the amounts hereinafter set forth the following tonnage of grain and other merchandise, namely—

| | |
|---|------------|
| In the month of March 1909, 13,732.040 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | \$2,403.11 |
| In the month of April 1909, 12,153.295 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 2,126.83 |
| In the month of May 1909, 11,635.770 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 2,036.26 |
| In the month of June, 1909, 12,975.660 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 2,270.74 |

Statement of Claim

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|---|----------|
| In the month of July, 1909, 15,908,- | |
| 610 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 2,784.01 |
| In the month of August, 1909, 20,- | |
| 384.150 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,567.23 |
| In the month of September, 1909, 22,- | |
| 124.595 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,871.80 |
| In the month of October 1909, 16,- | |
| 740.795 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 2,929.64 |
| In the month of November, 1909, 19- | |
| 927.607 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,487.33 |
| In the month of December, 1909, | |
| 21,538.460 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,769.23 |
| In the month of January, 1910, 21,- | |
| 912,845 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,834.75 |

Statement of Claim

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|--|-------------|
| In the month of February, 1910, 17,- | |
| 441,625 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,052.28 |
| In the month of March, 1910, 19,123,- | |
| 010 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,346.53 |
| In the month of April, 1910, 19,121,- | |
| 475 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,346.26 |
| Amounting in the aggregate to the sum of | \$42,826.00 |

And the said plaintiff further says that afterwards, to-wit, at the County aforesaid, on to-wit, January 24th, 1911, the defendant paid to the plaintiff on account of its aforesaid indebtedness and liability to it the sum of \$28,420.19, the said sum being the actual amount of the cost to it of keeping and performing its said agreement with the defendant, as aforesaid, which payment was made by the defendant and accepted by the plaintiff without prejudice to the plaintiff's right to sue for and recover from the defendant in addition thereto such just and reasonable compensation as in equity and right it was entitled to receive and be paid for keeping and performing the terms and conditions of the aforesaid agreement on its part kept and performed.

And the said plaintiff further says that it is justly and equitably entitled to recover from the said defendant the said balance of \$17,551.04 with interest thereon from January 24th, 1911, and the said defendant is liable for and justly indebted to it for said sum and being so liable did

Statement of Claim

on, to-wit, January 24th, 1911, at the County aforesaid, undertake and promise the plaintiff to pay the same; nevertheless being so liable it failed and neglected to pay the same, wherefore plaintiff claims to recover the same in this action.

KEYSTONE ELEVATOR & WAREHOUSE CO.,

(Sgd) WALTER F. HAGAR,
President.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA }
ss:

WALTER F. HAGAR being duly sworn doth depose and say that he is President of the Keystone Elevator and Warehouse Company, the plaintiff in the above action, that he makes this affidavit on its behalf, and that the facts therein set forth are true to the best of his knowledge, information and belief.

W. F. H.

(Sgd) WALTER F. HAGAR

Subscribed to and before me
this seventh day of April,
1911.

ROBERT G. ERSKINE

[SEAL] *Notary Public*

Commission expires February 27, 1913.

12 Endorsement: No. 2319 March Term 1911—C. P. No. 5—
Keystone Elevator and Warehouse Company vs. The Pennsylvania Railroad Company—Statement of Claim—To Prothonotary C. P. Enter Rule on Defendant to file an affidavit of defense in fifteen (15) days or judgment sec. reg. M. Hampton Todd, Attorney for Plaintiff—Filed Apr. 8-1911 Blair Pro Proth'y. M. H. Todd.

AFFIDAVIT OF DEFENSE

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, }
ss:

GEORGE D. DIXON, being duly sworn deposes and says: I am the Freight Traffic Manager of the Pennsylvania Railroad Company, the defendant in the above entitled action and I have knowledge of the matters and things referred to in the plaintiff's statement of claim filed therein. The defendant has a full and complete defense to the claim set out in said statement of claim, the nature and character of which is as follows:

The agreement made by the defendant with the plaintiff under the circumstances and conditions set out in the statement of claim for the payment to the plaintiff for its services rendered to the defendant, has been fully and entirely performed by the defendant by the payment by it to the plaintiff of the sum of \$28,420.19 on January 4th, 1911, payment whereof is admitted in the plaintiff's statement of claim to have been made to it, and no agreement was at any time made by the defendant whereby it became indebted to the plaintiff in any sum in excess of the said amount of \$28,420.19. The defendant is not indebted to the plaintiff in the sum of \$17,551.04 nor in any other sum whatsoever, nor did the defendant on the said 24th day of January, 1911 or on any other day undertake and promise the plaintiff to pay the same.

All of which matters and things are true and defendant expects to make proof thereof at the trial of this cause.

GEO. D. DIXON

Sworn to and subscribed before
me this 5th day of May,
1911.

H. E. CAIN
Notary Public

Commission expires February 21, 1915.

13 Endorsement: No. 2319 March Term 1911—C. P. No. 5—
Keystone Elevator & Warehouse Co. vs. Pennsylvania Railroad Co.—Affidavit of Defense—Filed May 5 1911 Pro Proth'y—
John Hampton Barnes Morris Building, Philadelphia.

14 C. P. No. 5, March Term, 1911.

No. 2319.

KEYSTONE ELEVATOR & WAREHOUSE COMPANY
vs.
PENNSYLVANIA RAILROAD.

To the Prothonotary:

Enter a rule on Defendant to plead in fifteen days or judgment
sec. reg.

M. HAMPTON TODD,
Attorney for Plaintiff.

May 5th, 1911.

Endorsement: No. 2319 March Term 1911—C. P. No. 5—Key-
stone Elevator & Warehouse Company vs. Pennsylvania Railroad
Co.—Rule to Plead—Filed May 6 1911 Pro Proth'y.—Todd.

Rule to Plead—Plea

To the Prothonotary:

Enter a rule on Defendant to plead in fifteen days or judgment *sec. reg.*

M. HAMPTON TODD

Attorney for Plaintiff

May 5th, 1911

The defendant pleads Non Assumpsit, Payment, Payment with Leave, etc.

JOHN HAMPTON BARNES,

May 9th, 1911.

15 Endorsement: No. 2319 March Term 1911—C. P. No. 5—
Keystone E. & W. Co. vs. Pennsylvania R. R. Co.—Plea—
Filed May 9 1911—J. W. Hill Proth'y.—John Hampton Barnes.

16 In the Court of Common Pleas No. 5 for the County of
Philadelphia, March Term, 1911.

No. 2319.

KEystone ELEVATOR AND WAREHOUSE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

And now June 16th, 1911, it is agreed between the parties in the above action that the same be referred to G. Heide Norris, Esquire, as Referee under the provisions of the Act of Assembly entitled "An Act to provide for the submission of civil cases by agreement of the parties to a referee learned in the law," approved May 14th, 1874, P. L. 166, and the amendments thereto.

The parties further agree to waive notice of time and place of hearing and to meet on notice from the Referee after his acceptance of the appointment and qualifying as such.

The compensation of the Referee to be fixed by himself after consultation with counsel for plaintiff and defendant, subject to the approval of the court.

M. HAMPTON TODD,
Attorney for Plaintiff.
J. HAMPTON BARNES,
Attorney for Defendant.

Endorsement: 2319 M'ch Term 1911—C. P. No. 5—Keystone Elevator & Warehouse Co. vs. Penna. Railroad Co.—Agreement to refer under Act May 14th, 1874—June 16-11—Todd for plaintiff Barnes for defendant.

17 C. P. No. 5, March Term, 1911.

No. 2319.

KEystone ELEVATOR AND WAREHOUSE CO.
vs.
PENNSYLVANIA RAILROAD COMPANY.

The undersigned having been appointed as Referee under Act of May 14th, 1874 by agreement of counsel for the parties, hereby accepts the appointment as such Referee and appoints as the time of first meeting, Friday June 23d, 1911 at 11 a. m. at his office No. 439 Land Title Building in the City of Philadelphia.

G. HEIDE NORRIS.

June 21, 1911.

CITY AND COUNTY OF PHILADELPHIA,
State of Pennsylvania, ss:

G. Heide Norris having been duly sworn according to law deposes and says that he will perform his duties as Referee in the above case according to law and to the best of his ability.

G. HEIDE NORRIS.

Sworn and subscribed to before me this 21st day of June, 1911.

JAS. W. FLETCHER,

Dep. Proth'y.

Endorsement: No. 2319 March Term 1911—C. P. No. 5—Keystone Elevator and Warehouse Co. vs. Pennsylvania Railroad Co.—Acceptance of Appointment as Referee and oath—Filed, Jun- 21 1911 Jas. W. Fletcher Pro Proth'y.—G. Heide Norris, Attorney at law, Rooms 437-439-441 New Land Title Building Philadelphia.

APPENDIX

IN THE

Court of Common Pleas, No. 5

March Term, 1911. No. 2319

KEYSTONE ELEVATOR AND WAREHOUSE CO.

vs.

PENNSYLVANIA RAILROAD COMPANY

REFEREE'S REPORT

To the Honorable the Judges of said Court:

The undersigned Referee, appointed by agreement of the parties under the Act of May 14, 1874, P. L. 176, filed June 16, 1911, having accepted the appointment and filed the required affidavit, notified counsel for the parties of a meeting to be held for the purposes of his appointment at his office No. 439 Land Title Building on June 23, 1911. On the above date and at subsequent meetings on July 10, 1911, February 28, April 28, June 5, July 9, July 14 and November 7, 1913, he was attended by M. Hampton Todd, Esq., counsel for plaintiff, and by John Hampton Barnes and George Stuart Patterson, Esqs., counsel for the defendant.

The testimony of the various witnesses who were sworn by the Referee was taken stenographically and afterwards reduced to typewritten form. The testimony is submitted with this report together with the exhibits.

This is an action to recover on an oral contract between the plaintiff and the defendant entered into on March 1, 1909, at Philadelphia, for services rendered by the plaintiff to the defendant for elevating, warehousing and other services on certain grain and other merchandise in the period from March 1, 1909, to April 30, 1910. In the agreement it was stipulated that plaintiff should perform the services agreed upon from March 1, 1909, until either party should give notice of a desire to terminate the same and it was also stipulated that for the services rendered the defendant should pay to the plaintiff a just and reasonable sum for each ton of grain and merchandise handled by it.

The statement of claim avers that the plaintiff, in consequence of said contract, entered upon its duties and performed services from March 1, 1909, to April 30, 1910, when the contract was terminated by notice from the defendant. It also claims that thirty-five cents a ton is a just and reasonable value for services performed for the defendant and claims the sum of \$42,826, for the actual tonnage handled by it under the contract. The statement also admits the payment by defendant on January 24, 1911, of the sum of \$28,420.19, leaving on that date a balance due, including interest on monthly balances of \$17,551.04, which sum is claimed by plaintiff from the defendant with interest thereon from January 24, 1911.

The affidavit of defence filed by the defendant claims that the sum of \$28,420.19 was paid by it in full satisfaction of the contract set forth in the statement of claim and denies that there is owing to the plaintiff the sum of \$17,551.04 or any other or further sum. The defendant also filed a plea of "*non assumpsit*, payment with leave," etc.

The matter having thus been brought to an issue and no question having been raised as to the amount or character of the services performed, the plaintiff called the following witnesses to prove that the just and reasonable value thereof was thirty-five cents a ton as the compensation stipulated for in the contract.

Samuel Bell, Jr., manufacturer of flour, with mills at Thirty-first and Market streets, Philadelphia, in business for thirty-five years, connected with the Merchants' Warehouse Company since 1890, one of the principal owners of the Washburn and Crosby mills and familiar with the subject of compensation for terminal service, testified that thirty-five cents a ton was a very reasonable charge in the years 1909 and 1910.

Jacob Michel, superintendent of the Merchants' Warehouse Company for twenty-five years, testified that fifty cents a ton was a fair compensation for these services in receiving grain, elevating it, redelivering it, collecting freight and being responsible for storage and warehouse receipts. He did not think thirty-five cents a ton was enough.

Richard M. Richardson, general superintendent of the Keystone Warehouse Company, at Buffalo, N. Y., since 1907, and acting for the Pennsylvania Railroad, New York Central Railroad, The Erie Railroad, the Wabash Railroad, the Michigan Central Railroad, thought that fifty cents a ton was a fair compensation for the services rendered by the plaintiff in the period from March 1, 1909, to April 30, 1910. He considered thirty-five cents per ton an unreasonably low charge.

Harvey C. Miller, principal stockholder in the Keystone Elevator and Warehouse Company, testified that he had been engaged in the grain and elevator business since 1880 in Philadelphia and in a number of places in Western Maryland. He considered thirty-five cents a ton a very reasonable charge for the services rendered by the plaintiff to the defendant in the period from March 1, 1909, to April 30, 1910. He thought the charge ought to be forty-two and a half cents a ton.

The defendant offered no testimony to disprove the reasonableness of the charge of thirty-five cents a ton claimed by the plaintiff as its proper compensation for the work performed under the contract but offered to show:

"The different methods of delivering grain and other commodities by the plaintiff, the reason for the employment of the Elevator Company by the defendant, the explanation of the service performed by the plaintiff for the defendant, for and on behalf of the consignees of grain and other claims of property; for the purpose of establishing the necessity for the employment of the Elevator Company by the defendant, the function which the Elevator Company performed in connection with transportation and the relation of the defendant to the owners and consignees of grain, etc., handled through the elevator and warehouse, this to be followed by proof of the profits made by the Elevator Company by the operation of its elevator."

Objection was made to this offer, but it was not pressed and testimony was permitted to be offered by the defendant for the purpose of throwing light on the reasonableness of the compensation claimed by exhibiting the amount and kind of work done by the plaintiff.

Robert Clinton Wright, freight traffic manager of the Pennsylvania Railroad, was then offered as a witness by the defendant and testified at length on the subject covered by the above offer. Incidentally tariff schedule of charges by the plaintiff company was offered in evidence for Tariff I. C. C.—G. No. 2953, in effect April 17, 1907, marked "Exhibit A." Of this the witness said that it covers a tariff of charges to the public and does not cover the rate of payment by the railroad company to the elevator company.

The defendant then made the following offers of proof:

1. That during the time embraced within the plaintiff's statement, to wit, from March 1, 1909, to May 1, 1910, the capital stock of the Keystone Elevator and Warehouse Company, the plaintiff in this case, was Ten thousand (10,000) shares at Ten (10) dollars each, all of which was issued and outstanding, and that during the said time Nine thousand three hundred and sixty (9360) shares

Referee's Report

of said stock, at a par value of \$93,600 was the property of Mr. Harvey C. Miller.

2. That during the period in question, the said Harvey C. Miller was a member of the firm of L. P. Miller & Sons, who were shippers, consignees and dealers in grain, and that during the period in question 90 per cent. of the business elevated, stored and handled through the elevator and warehouse of the plaintiff company at North Philadelphia, as referred to in the statement of claim, was grain elevated, stored and handled for and on account of the said firm of L. F. Miller & Sons, and for compensation for the elevation, storage and handling of which and the grain and merchandise of other owners and consignees through said elevator and warehouse this suit is brought, as is more specifically detailed in plaintiff's statement.

3. That said grain, the property of L. F. Miller & Sons and other owners, as aforesaid, and for the elevation, storage and handling of which through the Keystone Elevator this action was brought, was grain which was shipped (at the tariff freight rates) from points in States other than Pennsylvania over the lines of the defendant company to said Keystone Elevator and delivered by the defendant to the plaintiff company, who, in turn, elevated the same into the elevator and performed various other services with respect thereto, as more particularly detailed in the tariff hereinafter referred to.

4. That other grain dealers and consignees of grain competitors of L. F. Miller & Sons, located in the city of Philadelphia, received grain transported over the lines of the defendant from the same points as mentioned in paragraph 3 of this offer, and on which they paid the same freight transportation rate as that paid on grain of L. F. Miller & Sons, and that said other grain dealers and consignees did not have any elevator nor perform any elevator service in connection with such grain, and accordingly did not receive any compensation therefor.

These offers were objected to by the plaintiff as irrelevant and immaterial to the issue. The objection was sustained and an exception noted for the defendant.

The defendant then offered to prove:

5. The defendant further offers to prove from the books of the plaintiff company that the plaintiff company and the said Harvey C. Miller, as the owner of 93.6 per cent. of the capital stock of said company, have already received by reason of the payment made by the defendant to the plaintiff, as averred in the plaintiff's statement, and the payments made to the plaintiff by consignees and owners under the tariff (admitted in evidence) for the performance by the plaintiff of the various services agreed to be performed by the plaintiff for the defendant, and for the performance of which this action is brought, the cost of such performance, as well as a reasonable profit in addition to said cost, and that the further payment demanded by the said plaintiff company for the performance of said services is forbidden by the provisions of the Act of Congress, entitled "An Act to Regulate Commerce," approved February 4, 1887, its amendments and supplements, as well as the Act of Congress entitled "An Act to further regulate commerce with foreign nations and among the States," approved February 19, 1903, its amendments and supplements.

Counsel for the defendant stated (as recited in the offer) that the object was to show that the plaintiff had already received by means of the payment made by the defendant and by payments made to the plaintiff by consignees and owners under the published tariff, the full cost as well as a reasonable profit for the services performed by it under the contract with the plaintiff and that no further amount could be recovered by it, the same being forbidden by the Act of Congress February 4, 1887, and its supplements and that the Referee must take into consideration the payments made to the plaintiff by the owners and con-

Referee's Report

signees of grain under the tariff in question, for performance of the services which the plaintiff agreed with the defendant to perform and for which the defendant agreed to pay a reasonable compensation.

In view of the mixed nature of the contract recited in the statement of claim and with the thought (at the time) that evidence of payments by other parties that the defendant for services to be performed by the plaintiff, might throw some light on the balance claimed to be due by the defendant for the full amount of reasonable charges against the defendant under the contract, the Referee overruled the objection for the present and noted an exception for the plaintiff.

The defendant then offered:

6. A duly authenticated copy of the opinion, report and order of the Interstate Commerce Commission, decided January 7, 1913, dealing with the operation of the said Keystone elevator by the Keystone Elevator and Warehouse Company during the period covered by this suit, as well as the lease and contract with the defendant company under which the plaintiff has operated the same, and making an order against said defendant forbidding the leasing of said elevator to the plaintiff or the payment of any allowance for its services upon any property passing through said elevator or warehouse belonging to a stockholder of said plaintiff company, unless tariffs of the defendant should embrace similar privileges to all other shippers using this or any other elevator in the city of Philadelphia.

This offer was objected to by the plaintiff. The objection was overruled for the present and an exception noted for the plaintiff.

Walter F. Sims was then called as a witness and testified to various matters covered by offers 1, 2, 3, 4 and 5.

Counsel representing both sides then presented a stipulation under date of July 9, 1913, showing receipts and disbursements by the plaintiff company and by Harvey C.

Referee's Report

Miller trading as the Philadelphia Cleaner Company during the period covered by the contract in this suit.

This was objected to by the plaintiff as irrelevant. The objection was overruled and exception noted for the plaintiff.

The stipulation appearing in full on pages 66 and 67 shows:

Expense Keystone Elevator & Warehouse Co.
March 1, 1909 to April 30, 1910... \$36,935.69

Receipts Keystone Elevator & Warehouse Co.
March 1, 1909 to April 30, 1910.... 42,922.43

Expense Philadelphia Cleaner Co.
March 1, 1907 to April 30, 1910.... 3,169.00

Receipts Philadelphia Cleaner Co.
March 1, 1907 to April 30, 1910.. 35,060.08
(Paid by Elevator Co. to Harvey C. Miller.)

Harvey C. Miller was recalled and asked by counsel for the defendant, "Who performed the services under item 1 of the tariff?" (Exhibit "A") as follows:

"Receiving, weighing, storing freight cars, including first ten days storage and delivering to cars or wagons?"

This and subsequent questions on the same line were objected to by counsel for the plaintiff. The objections were overruled and an exception noted for the plaintiff.

Mr. Miller was asked, on page 75, "What would be the cost of duplication of the plant of the Cleaner Company?"

Objected to by plaintiff and objection overruled and exception noted.

On page 88 the plaintiff moved to strike from the record all testimony of Mr. Miller taken at the meet-

ing of July 9, 1913. Motion overruled and exception noted.

Carroll M. Bunting, a witness for the defendant, was asked, page 102: "What part of the gross receipts of the Elevator Company account was ascribed to services performed by the Elevator Company without the use of the patented process of the Cleaner Company?"

This was objected to by the plaintiff as irrelevant and not the subject of expert testimony. Objection overruled and exception noted.

The witness then went on as an expert to apportion the division of earnings between the elevator company and the cleaner company by comparison with his experience of similar divisions of earnings between one railroad company and another.

A motion was made by the plaintiff to strike out the entire testimony of the witness.

Robert C. Wright being recalled by the defendant, he was asked, page 111: "At the time covered by this suit, namely, between March 1, 1909 and April 30, 1910, did the published tariffs of the Pennsylvania Railroad Company authorize the payment of any allowance to any shipper, owner or consignee of grain, using the Keystone Elevator or any other elevator in the City of Philadelphia, upon grain owned by such shipper, owner or consignee?" and he was also asked, page 112: "During that period, did the Pennsylvania Railroad Company, in point of fact pay any such allowance to any shipper, owner or consignee of grain, as just described?"

Both these questions were objected to by the plaintiff. The objections were overruled and exception noted.

The action of the Referee in overruling practically all of the objections of the plaintiff to the defendant's formal offers of proof and to the subsequent questions asked of the defendant's witnesses, has been here fully set out so that no question can arise on the record as to the present view

of the Referee in his proposed action in now sustaining all of the objections made by the plaintiff and in striking out the testimony covered by the requests of the plaintiff to that effect.

Reference was made to the decision in the case of *Marr vs. Marr*, 103 Pa. p. 463, as to the duty of the Referee to hear all testimony, material and pertinent to the issue and to the report upon the same.

The Referee has never had any doubt, as evidenced by his sustaining the original objection made by plaintiff, that the only question material and pertinent to this case is as to what is a just and reasonable compensation under a *quantum meruit* for the services performed by the plaintiff for the defendant.

From the substance and manner in which some of the defendant's offers were put, the Referee was of the opinion however that perhaps they involved evidence which might throw light upon this very question of reasonable compensation. The contract itself called for so many things and services to be done and performed by the plaintiff for the defendant, that it might be possible, if the plaintiff received payment from other parties for any of these services so contracted for, the defendant might be relieved *pro tanto* from part of its obligation to pay.

In other words, the language of the contract and of the offers was to a certain extent confusing to the issue.

The testimony as taken threw no light whatever on the just and reasonable compensation due to the plaintiff by the defendant, but exhibited conclusively the purpose to invoke the provisions of the Interstate Commerce Act to defeat the plaintiff's claim for the balance due under the contract.

In passing on the question here involved, the Referee has not reviewed, and will not review, the testimony of the witnesses *in extenso* because the formal offers cover fully the defendant's contentions. In declining these offers and sustaining the plaintiff's objections, the defendant is fully

Referee's Report

protected, because on appeal, for the purposes of argument, the subject matter of the offers must be taken as proven.

Let us now take up the consideration of the merits of the case and the respective contentions of the parties.

The plaintiff claims that this is a common law action to recover on a *quantum meruit* a just and reasonable compensation, as stipulated for in the contract, for services fully and faithfully performed.

The defendant does not deny that the services were performed as contracted for, but alleges that the balance claimed by the plaintiff, over and above the amount admittedly received, cannot be recovered from it because, by virtue of holding the contract, the plaintiff has, out of its special facilities and by control through its principal stockholder of patented devices, made enormous profits out of its customers, the consignees and owners of grain and merchandise whose elevating and warehousing business it has transacted.

The defendant has cited the Act of Congress of February 4, 1887, Sections 2 and 15, known as the Act to Regulate Commerce, and the Act of June 29, 1906, Section 1, known as the Elkins Act, and the following cases:

In re Allowance to Elevators vs. I. C. C., 12 I. C. C., page 85.

Traffic Bureau of St. Louis vs. C. B. W. R. R., 14 I. C. C. page 317

Federal Sugar Refining Co. vs. B. & O. R. R. Co., 17 I. C. C. pages 40-47.

Southern Pacific Terminal Co. vs. Interstate Commerce Commission, 219 U. S. page 489.

Peavey & Co. vs. Union Pacific R. R. Co., 76 Fed. Rep. page 409.

Interstate Commerce Commission vs. Difffenbaugh, 222 U. S. page 42.

Referee's Report

Interstate Commerce Commission vs. Keystone Elevator Co., Opinion 2114 and order made thereon, January 7, 1913.

Also on the point that every contract is subject to the limitation of the Interstate Commerce Act.

N. Y., N. H. and H. R. R. Co. vs. Interstate C. C., 200 U. S. page 361.

Armour Packing Co. vs. United States, 209 U. S. page 56.

Section 2 of the Act to Regulate Commerce, approved February 4, 1887, as amended and supplemented, provides:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for so doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 15 of the same Act provides:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable

Referee's Report

charge as the maximum to be paid by the carrier or carriers for the services (service) so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for (in) under this section."

Section 1, of the Act of June 29, 1906, provides:

"The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concessions, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

The Referee has read and carefully considered the statutes above referred to and the cases cited by the defendant, but it does not seem to him that they have any bearing on the point in issue under the facts of this controversy.

It is undoubtedly true that the acts of Congress have been passed and the Interstate Commerce Commission has been created and it and the Courts have acted upon a state of affairs in the commerce of the United States, that required strong measures for correction.

The cases referred to by the defendant mostly arose in an endeavor to correct the result of the various devices which were adopted to circumvent the law. There were also other cases, where the machinery of justice has been invoked, in which the alleged violations of law grew out of a perfectly open and fair transaction not intended to offend any statute.

The Referee is aware that the Interstate Commerce Commission has undertaken to cut down compensation, for services rendered by shippers to railroads, to an infinitesimal point and even refused to sanction any payment whatever beyond the actual cost of the service.

The case of the *Allowance to Elevators*, 12 I. C. C. page 85, and the so-called *Peavey case*, *Traffic Bureau vs. Railroad Co.*, 14 I. C. C. page 317, are illustrations of this attitude.

The Supreme Court of the United States, however, in the case of the *Interstate Commerce Commission vs. Duffenbaugh*, 222 U. S. page 42, has put an end to such drastic action.

A bill in equity was filed against the order of the Interstate Commerce Commission in the Peavey case in the Circuit Court for the Western District of Missouri and an injunction was granted restraining its execution.

Peavey vs. Railroad Company, 176 Fed. Rep. page 409.

Referee's Report

An appeal was then taken to the Supreme Court of the United States and the action of the Court below was sustained.

I. C. C. vs. Diffenbaugh, 222 U. S. page 42.

In the opinion in this case delivered by Mr. Justice HOLMES, the following appeared:

"The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the Act of Congress in terms contemplates that if the carrier receives service from the owner of property transported or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in Section 15, the only restriction being that he shall pay no more than is reasonable."

Now what more have we in the case before us than is sanctioned by the statute and this language of the Court of last resort?

The defendant, conducting a railroad and being the owner of an elevator, a most useful adjunct in attracting business to its lines, makes a contract with an acute and experienced grain merchant to lease its elevator and carry on and conduct the elevating and warehousing business and agrees to pay him or his company a reasonable charge per ton for so doing. The business is carried on successfully and satisfactorily for a period of years antecedent to and for the time covered by the claim here made and then the defence is set up that it is against the law to pay the full claim because the shipper, conducting the elevator, has made large profits from other shippers out of the business.

It is true that Harvey C. Miller was a large majority stockholder in the Keystone Elevator Company, that he, or his firm, was a large shipper of grain, who used the elevator; it is also true that he practically owned the Philadelphia Cleaner Company, which cleaned the grain passing through the elevator and it is true that he made considerable

profit for the elevator company and for himself, as the Philadelphia Cleaner Company, out of the business he transacted, but wherein and how do these facts affect the right of the elevator company to recover its compensation under the contract with the defendant?

The law explicitly allows proper compensation under such circumstances and the Courts have said also that it does not attempt to equalize fortune, opportunity or ability. How then can it be successfully contended that Mr. Miller is to be deprived of what his business acumen has enabled him to earn for himself or his associates? Mr. Miller is certainly entitled to the earnings of his industry and skill without having them offset against what is due to him or his company on this contract.

No case has been cited by the defendant which sustains any conclusion to the contrary. If the plaintiff is not to receive the compensation contracted for by reason of the objection made by the defendant, then the benefit of the plaintiff's ability will inure not to it but to the defendant. There is no offer to prove any fraudulent device or arrangement, to secure an unfair advantage over competitors and in the opinion of the Referee no such fraudulent claim can be presumed or its effect produced by the circumstances of this case.

On the subject of the reasonableness of the charge, we must take into consideration the fact that a written contract for similar services has been in existence between the parties for a number of years prior to the period in controversy and the compensation fixed in that contract was thirty-five cents per ton. Moreover, the services required to be performed by the plaintiff under the previous written contract and under the present verbal agreement were many and varied, requiring technical skill and constant attention and involving many duties and responsibilities. As set out in the Statement of Claim, the plaintiff was required "to use all reasonable efforts to secure

to the lines owned, leased, controlled and operated by the defendant, all traffic controlled by it or destined to or from the elevator and warehouse, to prefer the traffic of the defendant to that of other lines in the use of the plaintiff's facilities; to furnish at its own cost, the manual labor required; to promptly load and unload all the cars of the defendant; to handle promptly and effectively all traffic delivered by the defendant; to pay all operating and running expenses of the elevator and warehouse; to act, free of cost, as agent of the defendant for collection of freight; to protect and indemnify the defendant from all liability on account of omission and commission on the part of the plaintiff in respect to the grain and merchandise received at the elevator and also on account of receipts for grain and merchandise received by the plaintiff; to keep all property, for which the defendant might be responsible, insured against fire and to perform the general duties incident to such agency."

The plaintiff's witnesses, Messrs. Samuel Bell, Jr. Jacob Michel and Richard M. Richardson, previously referred to, all persons of great experience in the grain elevator and warehouseing business, having been made acquainted with the terms of the contract, all testified that thirty-five cents per ton was a fair and reasonable compensation for the services performed by the plaintiff for the defendant.

Harvey C. Miller testified that the price ought to be forty-two and a half cents per ton for the period in which the services were performed, and some of the other witnesses referred to said that even fifty cents a ton would not be unfair in view of the duties of receiving grain, elevating and redelivering, collecting freight receipts and being responsible for storage and warehouse receipts. Mr. Miller testified (p. 25) that thirty-five cents a ton about represented the actual cost, and (on p. 113) that if the

business brought by the Philadelphia Cleaner Co. was excluded, the cost would have been \$1.52 1/2 per ton.

As against this evidence, the defendant offered no testimony or made any claim that the plaintiff was charging more than others in the same line of business, or that the charge of thirty-five cents per ton was not entirely reasonable.

The sixth offer of defendant (to which objection was made and temporarily overruled), related to the decision and order of January 17, 1913, of the Interstate Commerce Commission in the Keystone Elevator case. There the Commission dealt with the particular parties to this case under the contract, and the decision involved a consideration of the operation of the elevator company during the period covered by this contract, and an order was made prohibiting the making of any similar contract under like conditions for a period of two years from March 1, 1913.

Neither in the opinion of the Commission nor in its order referred to (made nearly three years after the services rendered had been performed), did it undertake to adjudicate upon the right of the Keystone Elevator Company to recover from the Pennsylvania Railroad Company compensation for the services rendered between March 1, 1909 to April 30, 1910. The order simply prohibits future contracts or leasing under similar conditions for two years from March 1, 1913, and in view of the decision of the Supreme Court in the Difffenbaugh case, that is probably as far as the Commission would now undertake to interfere.

The Referee now sustains all of the objections of the plaintiff and strikes out all the testimony as requested by the plaintiff.

In the opinion of the Referee the plaintiff has proved its case and the defendant has offered no legal defence to the payment of the balance claimed. This case is governed by the rules of common law applicable to actions

Referee's Report

of assumpsit on a *quantum meruit* and the plea of non assumpsit, payment, etc., is not sustained by offers to prove that the largest stockholder of the plaintiff company, who was also a member of a firm of grain shippers, furnishing a large portion of the business to the plaintiff and who was also the owner of a patented grain cleaning apparatus, made large profits for himself and the plaintiff out of the elevator and warehousing business during the period covered by the contract.

"Evidence as to the amount of profits earned by the plaintiff in his own business while attending to the defendant's business is inadmissible."

Wiley vs. Goodsell, 33 N. Y. App. Div., p. 452; 38 N.Y. Suppl., p. 376;
Cyc, Vol 40, p. 2848 and 2849.

The referee finds the following facts:

FINDINGS OF FACT

1. That the plaintiff at the special instance and request of the defendant agreed to render the service, described in the statement of plaintiff's cause of action, to the defendant for the term beginning the first day of March, 1909, and ending the 30th day of April, 1910, for the compensation of what the same should be reasonably worth.

2. That the reasonable and just value of the services rendered by the plaintiff to the defendant for the period set forth in the first above finding is thirty-five cents per ton for each ton of grain and other merchandise handled by it through the said elevator and warehouse upon which, under the terms of said agreement, it was entitled to compensation.

3. The plaintiff is entitled to compensation upon the following tonnage of grain and other merchandise, namely:

| | |
|--|------------|
| In the month of March, 1909, 13,732,040 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | \$2,403.11 |
| In the month of April, 1909, 12,153,295 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 2,126.83 |
| In the month of May, 1909, 11,635,770 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 2,036.26 |
| In the month of June, 1909, 12,975,660 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 2,270.74 |
| In the month of July, 1909, 15,908,610 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 2,784.01 |

Referee's Report

| | |
|---|----------|
| In the month of August, 1909, 20,384.150 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,567.23 |
| In the month of September, 1909, 22,124.595 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,871.80 |
| In the month of October, 1909, 16,740.795 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 2,929.64 |
| In the month of November, 1909, 19,927.607 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,487.33 |
| In the month of December, 1909, 21,538.460 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thousand pounds amounts to the sum of | 3,769.23 |
| In the month of January, 1910, 21,912.845 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thou- sand pounds amounts to the sum of | 3,834.75 |

| | |
|--|-------------|
| In the month of February, 1910, 17,441,625 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thou- sand pounds amount to the sum of | 3,052.28 |
| In the month of March, 1910, 19,123,010 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thou- sand pounds amounts to the sum of | 3,346.53 |
| In the month of April, 1910, 19,212,475 pounds of grain and other merchandise, which at the rate of thirty-five cents per ton of two thou- sand pounds amounts to the sum of | 3,346.28 |
| Amounting in the aggregate to the sum of | \$42,826.00 |

4. That the defendant has paid to the plaintiff on account of said services on the 24th of January, 1911, the sum of \$28,420.19.

CONCLUSIONS OF LAW

First.—That the defence set up and offered to be proved by the defendant is an insufficient answer to the plaintiff's claim.

Second.—That there is due and owing by the defendant to the plaintiff the sum of \$17,551.04, with interest thereon from January 24, 1911.

The Referee therefore recommends that judgment shall be entered accordingly in favor of the plaintiff and against the defendant.

All of which is respectfully submitted.

G. HEIDE NORRIS

Referee

January, 1914.

Exceptions of Defendant to Report of Referee

EXCEPTIONS OF THE PENNSYLVANIA RAIL-ROAD COMPANY, DEFENDANT, TO REPORT OF REFEREE

First.—The defendant excepts to the refusal of the Referee to admit in evidence the defendant's offers as follows:

“1. That during the time embraced within the Plaintiff's statement, to wit, from March 1st, 1909, to May 1st, 1910, the capital stock of the Keystone Elevator & Warehouse Company, the Plaintiff in this case, was Ten thousand (10,000) shares at Ten (10) Dollars each, all of which was issued and outstanding, and that during the said time Nine thousand three hundred and sixty (9360) shares of said stock, at a par value of \$93,600 was the property of Mr. Harvey C. Miller.”

“2. That during the period in question, the said Harvey C. Miller was a member of the firm of L. F. Miller & Sons, who were shippers, consignees, and dealers in grain, and that during the period in question 90 per cent. of the business elevated, stored and handled through the elevator and warehouse of the Plaintiff Company at North Philadelphia, as referred to in the statement of claim, was grain elevated, stored and handled for and on account of the said firm of L. F. Miller & Sons, and for compensation for the elevation, storage and handling of which and the grain and merchandise of other owners and consignees through said elevator and warehouse this suit is brought, as is more specifically detailed in plaintiff's statement.”

“3. That said grain, the property of L. F. Miller & Sons and other owners, as aforesaid, and for the elevation, storage and handling of which through the Keystone Elevator this action was brought, was grain which was shipped (at the tariff freight rates) from points in States other than Pennsylvania over the lines of the Defendant Company to said Keystone Ele-

Exceptions of Defendant to Report of Referee

vator, and delivered by the Defendant to the Plaintiff Company, who, in turn, elevated the same into the elevator and performed various other services with respect thereto, as more particularly detailed in the tariff hereinafter referred to."

"4. That other grain dealers and consignees of grain, competitors of L. F. Miller and Sons, located in the City of Philadelphia, received grain transported over the lines of the Defendant from the same points as mentioned in paragraph 3 of this offer, and on which they paid the same freight transportation rate as that paid on grain of L. F. Miller & Sons, and that said other grain dealers and consignees did not have any elevator nor perform any elevator service in connection with such grain, and accordingly did not receive any compensation therefor."

"5. The Defendant further offers to prove from the books of the Plaintiff Company that the Plaintiff Company and the said Harvey C. Miller, as the owner of 93.6 per cent. of the capital stock of the said Company, have already received by reason of the payment made by the Defendant to the Plaintiff, as averred in the Plaintiff's Statement, and the payments made to the Plaintiff by consignees and owners under the tariff (admitted in evidence) for the performance by the Plaintiff of the various services agreed to be performed by the Plaintiff for the Defendant, and for the performance of which this action is brought, the cost of such performance, as well as a reasonable profit in addition to said cost, and that the further payment demanded by the said Plaintiff Company for the performance of said services is forbidden by the provisions of the Act of Congress, entitled 'An Act to Regulate Commerce,' approved February 4, 1887, its amendments and supplements, as well as the Act of Congress entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February 19, 1903, its amendments and supplements."

"6. A duly authenticated copy of the opinion, report and order of the Interstate Commerce Commission, decided January 7, 1913, dealing with the

Exceptions of Defendant to Report of Referee

operation of the said Keystone Elevator by the Keystone Elevator & Warehouse Company during the period covered by this suit, as well as the lease and contract with the Defendant Company under which the Plaintiff has operated the same, and making an order against said Defendant forbidding the leasing of said elevator to the Plaintiff or the payment of any allowance for its services upon any property passing through said elevator or warehouse belonging to a stockholder of said Plaintiff Company, unless tariffs of the Defendant should embrace similar privileges to all other shippers using this or any other elevator in the City of Philadelphia."

Second.—The defendant excepts to the refusal of the Referee to admit in evidence the stipulation of counsel set out on pages 66 and 67 of the testimony, as follows:

"AND Now, July 9th, 1913, it is stipulated between the parties to this cause that the books of the Plaintiff Company show the following for the period between March 1st, 1909, and April 30, 1910:

I. Expenses.

| | |
|-----------------|-----------------|
| Sundries | \$5,012.68 |
| Coal | 2,847.62 |
| Oil | 177.89 |
| Rents | 7,872.50 |
| Labor | 17,975.00 |
| Salaries | 3,050.00 |
| Total | \$36,935.69 |

That during the same period of time the expenses of the Cleaner Company were \$3,169.00

II. Receipts.

| | |
|------------------------|-----------|
| Item #1 on tariff..... | 3,976.45 |
| " #2 " " | 2,300.55 |
| " #2 " " | 6,335.31 |
| " #4 " " | 22.14 |
| " #5 " | 22,818.59 |
| " #7 " | 919.26 |

Exceptions of Defendant to Report of Referee

| | |
|---|-----------------|
| Sub-letting leased property..... | 415.00 |
| Weighing on wagon scales..... | 156.72 |
| Steam heat sold to Railroad Co..... | 1,605.88 |
| Warehouse Storage (Not elevator)..... | 919.80 |
| Charges at 1-4¢ bushel..... | 53.57 |
| Received from wagons at 1-2¢ per bushel.. | 3.19 |
| " " " 1¢ " " .. | 35.22 |
| Transferring lading of car for Railroad Co. | 5.00 |
| Clipping Oats | 585.95 |
| Cleaning grain | 7.05 |
| Treating grain | 2,119.46 |
| Cooling "..... | 9.77 |
| Shelling "..... | 46.92 |
| Carting..... | 1.25 |
| Drying grain | 2,159.70 |
| " " at 1¢ | 511.14 |
| " " at 2¢ | 39.50 |
| " " at 5¢ | 23.00 |
| Cracking | 852.01 |
| Total | \$15,922.43 |

That during the same period of time the Elevator Company paid Mr. Harvey C. Miller the sum of \$35,060.08 for the right to use in said elevator certain patented processes for cleaning and otherwise treating grain, said payment being at the rate of 3-4¢ per bushel on all grain so cleaned or treated.

July 9, 1913.

M. HAMPTON TODD,
Atty for Pltf.

JOHN HAMPTON BARNES
Atty. for Defendant.

Third.—The defendant excepts to the refusal of the Referee to admit in evidence the testimony of Harvey C. Miller in answer to the question:

"Who performed the services under item 1 of the tariff?" (Exhibit A) as follows: "Receiving, weighing, storing freight cars, including first ten days storage and delivering to cars or wagons."

Exceptions of Defendant to Report of Referee

to the refusal of the Referee to admit in evidence the testimony of Harvey C. Miller in answer to the question:

"What would be the cost of duplication of the plant of the Cleaner Company?"

and to the ruling of the Referee striking out all the testimony of said Harvey C. Miller taken at the meeting on July 9, 1913.

Fourth.—The defendant excepts to the refusal of the Referee to admit in evidence the testimony of Carroll M. Bunting, a witness called by the defendant, in answer to the question:

"What part of the gross receipts of the Elevator Company account was ascribed to services performed by the Elevator Company without the use of the patented process of the Cleaner Company?"

and to the striking out by the Referee of the entire testimony of the said witness Carroll M. Bunting.

Fifth.—The defendant excepts to the refusal of the Referee to admit in evidence the testimony of Robert C. Wright in answer to the question:

"At the time covered by this suit, namely, between March 1, 1909 and April 30, 1910, did the published tariffs of the Pennsylvania Railroad Company authorize the payment of any allowance to any shipper, owner or consignee of grain, using the Keystone Elevator or any other elevator in the City of Philadelphia, upon grain owned by such shipper, owner or consignee? During that period, did the Pennsylvania Railroad Company, in point of fact pay any such allowance to any shipper, owner or consignee of grain, as just described?"

Sixth.—The defendant excepts to the following statement by the Referee:

"The Referee has never had any doubt, as evidenced by his sustaining the original objection made

Exceptions of Defendant to Report of Referee

by plaintiff, that the only question material and pertinent to this case is as to what is a just and reasonable compensation under a *quantum meruit* for the services performed by the plaintiff for the defendant."

Seventh.—The defendant excepts to the express finding of the Referee as follows:

"The Referee now sustains all of the objections of the plaintiff and strikes out all the testimony as requested by the plaintiff."

Eighth.—The defendant excepts to the finding by the Referee as follows:

"In the opinion of the Referee the plaintiff has proved its case and the defendant has offered no legal defence to the payment of the balance claimed. This case is governed by the rules of common law applicable to actions of *assumpsit* on a *quantum meruit* and the plea of *non assumpsit*, payment, etc. is not sustained by offers to prove that the largest stockholder of the Plaintiff Company, who was also a member of a firm of grain shippers furnishing a large portion of the business to the plaintiff and who was also the owner of a patented grain cleaning apparatus, made large profits for himself and the plaintiff out of the elevator and warehousing business during the period covered by the contract."

Ninth.—The defendant excepts to the following finding of fact by the Referee:

"2. That the reasonable and just value of the services rendered by the plaintiff to the defendant for the period set forth in the first above request is thirty-five cents per ton for each ton of grain and other merchandise handled by it through the said elevator and warehouse upon which, under the terms of said agreement, it was entitled to compensation."

Tenth.—The defendant excepts to the finding by the Referee in the third finding of fact that the plaintiff is entitled to compensation upon the tonnage of grain and merchandise therein set forth in the sum of \$42,826.

Exceptions of Defendant to Report of Referee

less as a credit the payment made by the defendant to the plaintiff of the sum of \$28,420.19.

Eleventh.—The defendant excepts to the finding of law by the Referee as follows:

"1. That the defence set up and offered to be proved by the defendant is an insufficient answer to the plaintiff's claim."

Twelfth.—The defendant excepts to the finding of law by the Referee as follows:

"2. That there is due and owing by the defendant to the plaintiff the sum of \$17,551.04, with interest thereon from January 24, 1911.

The Referee therefore recommends that judgment shall be entered accordingly in favor of the plaintiff and against the defendant."

JOHN HAMPTON BARNES
Attorney for defendant.
Jany 28, 1914

The Referee has considered the foregoing exceptions and sees no reason to change his report in any particular. The exceptions are therefore dismissed.

G. HEIDE NORRIS

January 29, 1914.

Referee

TESTIMONY

Meeting held before the Referee, G. HEIDE NORRIS, Esq., at his office, No. 439 Land Title Building, Philadelphia, Pa., on Friday, June 23, 1911, at 11 a. m.

PRESENT:

G. HEIDE NORRIS, Esq., *Referee.*

M. HAMPTON TODD, Esq., *Attorney for plaintiff.*

JOHN HAMPTON BARNES, Esq., *Attorney for defendant.*

SAMUEL BELL, JR., having been duly sworn, was examined as follows:

By MR. TODD:

Q. Where do you live?

A. 1314 Locust Street.

Q. What business are you engaged in?

A. Manufacturer of flour, and flour mills.

Q. Have you any interest in the elevator business?

A. None except my own.

Q. Where is it?

A. Thirty-first and Market.

Q. Known by what name?

A. Quaker City Flour Mills.

Q. How long have you been engaged in the grain and flour business?

A. About thirty-five years.

Q. Are you familiar with the operations of a grain elevator?

A. Yes.

Q. At one time, I believe, you were selected as an arbitrator, were you not, by either the Keystone Elevator or the Pennsylvania Railroad, to pass upon the reasonable-

Samuel Bell, Jr.

ness of the allowance then made by the Railroad Company to the elevator?

A. Yes, sir.

By THE REFEREE:

Q. In what case?

A. That was the case of Pennsylvania Railroad and Keystone Elevator Company.

By MR. TODD:

Q. It was under the terms of the lease?

A. Under the terms of the lease.

Q. Who selected you?

A. There was Mr. Kingston, of the Pennsylvania Railroad, and myself and another gentleman; I forget who that was.

By THE REFEREE:

Q. Was your appointment in regard to the question involved in this case?

A. It was the price of the terminal, you understand, that the Pennsylvania Railroad Company was to pay to the Keystone Elevator Company; at that time, in 1906, there was a terminal to be charged.

By MR. TODD:

Q. Have you read the plaintiff's statement of his cause of action in this case?

A. I have.

Q. You also, by reason of your connection with the Merchants' Warehouse Company, are familiar or not with the subject of compensation for terminal services?

A. Yes.

Q. How long have you been identified with the Merchants' Warehouse Company?

A. Since 1890.

Q. You are also familiar with this subject in other places besides Philadelphia, are you not?

A. Yes, sir.

Q. Your business brings that subject up before you continuously, does it not?

A. Yes, sir.

Q. You are a modest man, I know, but I would like to show that you are one of the principal owners in the Washburn & Crosby Mills, are you not?

A. Yes, sir.

Q. Which make 45,000 barrels of flour a day, do they not?

A. Yes, sir; that is, in all their plants.

Q. Based upon the information which you have acquired in this way, from your ownership of the Quaker City Milling Company, who own elevators, and having familiarized yourself with the services alleged to have been performed by the Keystone Elevator and Warehouse Company for the Pennsylvania Railroad Company, what would you say would be a fair and reasonable compensation for such services for the period from March 1, 1909 to April 30, 1910, payable monthly?

A. Can I not just say what I base that on when I answer it?

Q. You can say first what you think it should be and then give your reasons for it afterwards.

A. I would say that 35 cents a ton would be a very reasonable charge on grain.

Q. Now go on and just tell the Referee your reasons for saying that.

A. We handle grain at the Quaker City Flour Mill and our expense there of loading and unloading and doing similar work, such as was performed by the Elevator Company, the cost was fully the amount I have named, 35 cents a ton. On merchandise, basing it on my long experience

with the Warehouse Company, I would say that, as that is handled differently, a fair charge on that would be 50 cents a ton. I am basing that on my connections with the costs doing the business in my connection with the Merchants' Warehouse Company.

Q. They handle about how many tons of merchandise, would you say, a year, the Merchants' Warehouse Company?

A. In 1890 there was 120,000 tons handled. At that time the terminal cost was 38.7 cents per ton. Owing to the advance in labor, we find that in 1904, when we handled 208,838 tons, the cost was 61.1 cents per ton. Now we go from 1904 to 1911, when we handled 83,513 tons for five months—I am just giving that to take it up to date—that cost 87.6 cents. That is the reason I am basing my 50 cents per ton on merchandise.

Q. Of course, merchandise such as you have described as handled through your Merchants' Warehousing Company is more expensive than grain?

A. A great deal.

Q. Was it more or less expensive to operate an elevator and render the services such as were rendered in this case in 1909-10 than it was prior to that time?

A. Yes, sir; more expensive.

Q. How much percentage would you say there had been of an increase in the expense of operation of elevators between, take the year 1903 and the year 1909? I just take those two years for example; if there are any other two years that illustrate it better, take them.

A. You said elevators; I do not know whether I can answer that question, because I have not the statement of the cost.

Q. Give us your approximation on that. Was it more or less?

A. I should say, when I based 35 cents a ton charge in 1906, that it is more costly to do the grain business

and handle it in the same way now than it was at that time.

Q. In 1909?

A. Yes. That is my reason for saying that; I investigated then and knew that was a low cost, therefore, 35 cents a ton today must be a very low cost.

By THE REFEREE:

Q. Not today, but in 1909.

A. Yes.

By MR. TODD:

Q. By low cost you mean a reasonably low compensation for the services?

A. Yes, reasonably low compensation for the services.

Q. You do not know, do you, directly what it has cost the Keystone people to render this service?

A. No, sir.

CROSS-EXAMINATION

By MR. BARNES:

Q. In the matter in which you were arbitrator in 1906, you say it was under a lease. Was that the same lease as is involved here?

A. Yes, sir.

Q. And you rendered a decision on that subject and made an award on that subject?

A. Yes. The Referees all decided at that time that that was the proper charge to make at that time.

Q. So this same question has been before you as arbitrator about which you are now testifying as an expert witness?

A. Yes, sir.

Q. And your testimony as an expert, of course, is in entire consistency with your report as an arbitrator?

A. Yes, sir.

(At Mr. Barnes' request, the following portion of the witness's direct testimony was read: "We handle grain at the Quaker City Flour Mill, and our expense there of loading and unloading and doing similar work, such as was performed by the Elevator Company, the cost was fully the amount I have named, 35 cents a ton.")

By MR. BARNES:

Q. By similar work, do you mean work in connection with the transportation of grain by any railroad?

A. No, sir; that is just the loading and unloading.

Q. From what?

A. From the cars. We have to unload it from the cars, elevate it, weigh it and put it back into the bins.

Q. With what railroad has your Company siding connections?

A. Pennsylvania Railroad.

Q. In what way, then, does the work which you do at that elevator differ from what you understand to be that done by the Keystone Elevator and Warehouse Company in this case?

A. I would say that they did not have very much service to do outside of that, without they collected freights.

(Question repeated.)

By MR. TODD:

Q. How do the services rendered by the two compare?

A. I should think they are about the same.

By MR. BARNES:

Q. I understand you, then, to express an opinion that the cost of that service is in excess of 35 cents, or is 35 cents?

A. Is 35 cents.

Q. And that includes no profit to the Elevator Company for doing the work?

A. In handling quantities, they may be able to make a profit on that; I do not know.

Q. What would be your judgment as to the percentage of profit in that transaction, that payment?

A. I should think 10 per cent, they ought to have anyhow.

Q. That is to say, that the 35 cents includes, in the gross business on which such payment is made, the cost of service plus 10 per cent on the gross?

A. That, I say, would be a reasonable charge.

Q. I asked you whether the 35 cents includes that?

A. Yes, sir.

RE-DIRECT EXAMINATION

By MR. TODD:

Q. Does the Washburn-Crosby Company have any elevators?

A. Yes, sir.

Q. To what extent?

A. They have some four hundred, but they are run under different management from the Washburn-Crosby Company; but they are owned by the Washburn Company.

Q. They are operated in connection with the Washburn-Crosby Company?

A. Yes, sir.

Q. Four hundred elevators?

A. We have what we call houses along the line of the railroad.

Q. That is where you receive grain from one car and spout it into another?

A. Yes. That would be different from a terminal elevator.

Q. The price which you have named for the Quaker City Elevator; does it or not include responsibility for freight collections and for warehouse receipts?

A. No, sir.

Q. Or proper deliveries, right deliveries?

A. No, sir.

(Adjourned until Monday, July 10, 1911, at 10.30 a. m.)

Meeting held at the office of the Referee, G. Heide Norris, Esq., 437 Land Title Building, Philadelphia, on Monday, July 10th, 1911 at 10.30 a. m.

Present:

G. HEIDE NORRIS, Esq., *Referee*.

M. HAMPTON TODD, Esq., *for Plaintiff*.

JOHN HAMPTON BARNES, Esq., *for Defendant*.

JACOB MICHEL, having been duly sworn, was examined and testified as follows:

By MR. TODD:

Q. Where do you reside?

A. Philadelphia.

Q. What is your business?

A. Superintendent of the Merchants' Warehouse Company.

Q. How long have you been such superintendent?

A. About twenty-five years.

Q. The Merchants' Warehouse Company is a freight terminal station of the Pennsylvania Railroad, is it not?

A. Yes, sir.

Q. What is the character of the duties performed by the Merchants' Warehouse Company?

A. We receive the freight from the Pennsylvania Railroad Company in cars and unload it and store it and deliver it.

Q. Are you familiar with the duties performed by the Keystone Elevator and Storage Warehouse Company for the Pennsylvania Railroad at North Philadelphia?

A. No, sir. I am familiar with it to the extent that they handle merchandise the same as I do. I am not familiar with grain. We do not handle grain, and never did handle grain.

Q. Don't you handle grain in sacks?

A. We might handle it, but very little.

Q. A limited quantity?

A. We don't get a car in five years, I guess.

Q. You receive merchandise generally at the platform, handle it and redeliver it?

A. Yes, sir.

Q. And that you say you have been doing for twenty-five years?

A. Yes, sir.

Q. Assuming as a fact that the Keystone Elevator and Warehouse Company received grain, elevated it, re-delivered it, collected freights, was responsible for storage and warehouse receipts, what in your judgment would you say would be a fair compensation for such services per ton during the period covered by the time from March 1st, 1909, to April 30th, 1910?

A. Fifty cents a ton.

By MR. BARNES:

Q. I understood you to say that you had not at your place had anything to do with elevating and the storage of grain?

A. That is right.

Q. Or services of that character?

A. Yes, sir.

By MR. TODD:

Q. But you have handled hay?

A. Yes.

Jacob Michel

Q. Which is also included in the services rendered by the Keystone Elevator and Warehouse Company?

A. Yes, sir.

Q. And straw?

A. Yes, sir.

Q. What would you say would be a fair compensation?

A. I should say fifty cents would be a fair compensation.

Q. What would you say as to thirty-five cents a ton?

A. Well, I don't think it is enough. That is, not now. It might have been in former times, but things have changed. Everything has gotten dearer, labor, and so forth.

Q. What was the rate of allowance made to your warehouse when you started in twenty-five years ago?

A. The first agreement was at twenty cents a ton, and then they saw they could not operate the warehouse at that price at all, and the Pennsylvania Railroad Board authorized Henry D. Welsh, who was then a director, to report as to what price they ought to compensate at, and the price was then raised to thirty-five cents a ton on the recommendation of Mr. Welsh, and it was that for a few years, and then it was subsequently raised on the assorted merchandise to forty cents.

Q. What time was that raise made?

A. The raise from twenty cents to thirty-five cents was made a few months after the warehouse was in operation. Say about six months. The next raise of five cents, to forty cents, was made subsequently, in 1891.

Q. Can you tell us the rate of wages for common labor starting with 1886?

A. At that time we paid our laborers \$41 a month. At that basis, that would make it \$1.33 a day. There were subsequent raises—three of them, I think. I have the dates all here. At the present time we pay them \$2.06 a day.

Q. That is practically an increase of sixty percent?

A. Yes, sir; sixty percent in wages alone.

Q. How about the materials that entered into the work?

A. All materials have increased in price I should say at least thirty-three percent. Possible some more.

Q. Comparing 1903 with 1909 what would you say had been the increase in wages and of the materials used? I mention 1903, because that is the date of our prior contract with the railroad.

A. I can give you the successive raises of the wages. In 1886 we paid \$41 a month. That is at the rate of \$1.33 a day. The first advance was to \$45 a month, in June 1902. Then, after a few years there was a subsequent raise of ten percent, and after a few years more another ten percent. Then, there was a raise of six percent on April 1st, 1910. So that we now pay \$2.06 a day, as against \$1.33 in 1886.

Q. Was there or not, or have you any data which will enable you to speak on it, an increase in the materials used in and about an elevator or warehouse?

A. I have ~~it~~ anything now except the general increase in everything, which everybody knows.

Q. What do you know? We cannot examine everybody. We are just asking you.

A. I know repairs of all kinds are higher, and oils, and everything that enters into the operation.

Q. About how much percentage?

A. I should say at least thirty-three percent. Some twenty-five percent.

By THE REFEREE:

Q. This merchandise that you handle, what is it?

MR. TODD: He has testified assorted merchandise; general merchandise.

Richard M. Richardson

By THE REFEREE:

Q. You are speaking of general merchandise?
 A. Yes, sir.

MR. BARNES: I do not understand that he has handled any grain.

MR. TODD: Oh, yes; he handles grain in sacks.

MR. BARNES: He said not often; once a year.

No cross-examination.

RICHARD M. RICHARDSON, having been duly sworn, was examined and testified as follows:

By MR. TODD:

Q. Where do you reside?
 A. Buffalo, New York.
 Q. What is your employment there?
 A. General superintendent of the Keystone Warehouse Company.
 Q. At what place?
 A. At Buffalo.
 Q. How long have you been in that position?
 A. Since 1907. Four years.
 Q. What kind of a business do you do there?
 A. General merchandise warehouse work.
 Q. There is no elevation involved?
 A. No, sir.
 Q. That is, grain elevation?
 A. No, sir. No grain elevators or belts, or anything like that; no bulk grain.
 Q. Do you act for more than one railroad company there?
 A. Yes, sir.
 Q. Who do you act for?

A. The Pennsylvania, the New York Central, the Erie, Wabash, and the Michigan Central.

Q. Your services include the receipt and discharge of merchandise at the platform?

A. Yes, sir.

Q. Flour in sacks?

A. Yes, sir.

Q. And grain in sacks too, or not?

A. Oh, yes; occasionally corn comes in sacks, and there are four days free storage with roads which we have terminal arrangements with.

Q. You are allowed a terminal charge for the services thus rendered?

A. Yes, sir.

Q. What free storage period have you?

A. We give them four days free storage.

Q. Are you familiar with the services rendered by the Keystone Elevator and Warehouse Company at North Philadelphia?

A. Yes, sir; fairly so.

Q. Including the receipt of grain in bulk and the elevation by machinery?

A. Yes, sir.

Q. And delivery to bins?

A. Yes, sir.

Q. And delivering out?

A. Yes, sir.

Q. And collection of freights?

A. Yes, sir.

Q. And the receipt of hay and straw in bulk?

A. Yes, sir.

Q. And also delivering it at the warehouse?

A. Yes, sir.

Q. The receipt of hay and straw is more directly in accord with the business that you do at Buffalo?

A. The hay is, yes, sir. That would come under the general merchandise.

Richard M. Richardson

Q. Based upon your knowledge of that service, and in the line of the experience that you have had from rendering terminal services generally, what would you say would be a fair compensation for such services in the period of time covered by March 1st, 1909, and April 30th, 1910?

A. Do you mean the actual cost with the percentage of profit on there, and everything?

Q. Yes.

A. Offhand I should say fifty cents a ton.

Q. Would you or would you not consider thirty-five cents a ton an unreasonable charge?

A. An unreasonably low charge, I should say.

Q. Has there or not been any increase in wages between the year 1903 and 1909 for the character of labor employed in this kind of work?

A. Yes, sir.

Q. What about has been the percentage in increase?

A. From twenty to twenty-five percent.

Q. Before you went to Buffalo where were you employed, and in what capacity?

A. I was superintendent of the Keystone Elevator and Warehouse Company at North Philadelphia.

Q. The plaintiff in this action?

A. Yes, sir.

Q. How long had you been in that position?

A. I guess about two years.

Q. You are entirely, then, familiar with the very business which is the subject of this controversy?

A. Oh, yes. The elevator and handling, and all that.

Q. And also with the figures incident to the conduct of the business?

A. I have no recollection of what those costs are now. You see, it has gone out of mind.

Q. Based on the experience which you had obtained while you were such superintendent, supplemented by your experience in the terminal warehouse at Buffalo, are you

still of the opinion that thirty-five cents a ton would be an unreasonably low charge?

A. Decidedly so.

Q. You were superintendent under the old agreement of October 1903?

A. Yes, sir.

Q. Which provided for thirty-five cents a ton?

A. Thirty-five cents a ton elevation and the handling that went through there.

CROSS-EXAMINATION

By MR. BARNES:

Q. In your estimate of the return per ton, you say you include cost and profit. In what relative percentage do those two elements enter into your computation?

A. I should say we ought to have twenty-five percent profit.

HARVEY C. MILLER, having been duly sworn, was examined and testified as follows:

By MR. TODD:

Q. You are the principal stockholder in the Keystone Elevator and Warehouse Company, are you not?

A. Yes, sir.

Q. You are also the patentee of the drying process which is in use in the elevator?

A. Yes, sir.

Q. The agreement between the Keystone Elevator and Warehouse Company, which went into effect in October of 1904, terminated when, according to its terms, first?

A. In 1908.

Q. From October 1908 on how long was it continued in force and by what means?

Harvey C. Miller

A. It was continued first by a resolution of the Board, I think.

Q. The Board of the Pennsylvania Railroad?

A. Of the Pennsylvania Railroad Company, yes, sir. Just an extension of a few months at a time.

Q. Until what date?

A. I think March 1st, 1909.

Q. The resolution of the Board which extended it to that date was not renewed? That is practically the situation, is it not? There was a resolution of the Board, of which you had notice, extending it until that date?

A. Yes, sir.

Q. And there was no subsequent resolution renewing it?

A. No, sir.

Q. How did you come to perform or continue to perform the services in connection with the operation of that elevator?

A. With an understanding that we would be paid.

Q. Who was that interview with, and when and where, and who were present?

A. Mr. John B. Thayer, Mr. George Dixon, Mr. George Stuart Patterson, and yourself and myself.

Q. How long prior was that to the first of March 1909?

A. I could not recall the exact date. It was sometime prior to that. A short time possibly. I cannot recall the exact date.

Q. From October of 1908 until the first of March 1909 there had been negotiations on hand for a renewed contract, had there not?

A. Yes, sir.

Q. The old contract was absolutely terminated on March 1st 1909, and then this arrangement of which you have spoken was entered into just shortly prior to that time?

A. Yes, sir.

Q. Just what was that arrangement?

MR. BARNES: This was verbal, oral?

MR. TODD: Oh, yes.

A. We were to continue the operation of the elevator until such time as we could reach an agreement or an understanding or make a contract, and they were to pay us—we were to perform the same services that we had, and they were to pay us a reasonable compensation for our services.

Q. The question of the amount being left open?

A. Yes, sir.

Q. Practically, then, you were to continue to perform the same services?

A. Yes, sir.

Q. The only question left open being the amount of compensation?

A. Yes, sir. We were to continue. We were to pay the same rent, and did pay the same rent.

Q. That continued until what time?

A. That continued for fourteen months.

Q. Until the 30th day of April 1910?

A. Yes, sir.

Q. When a new agreement was negotiated, which we have nothing to do with here?

A. Yes, sir.

MR. TODD: In this connection I offer in evidence the statement of our cause of action, filed in this case, so far as it refers to the elements of charge, beginning at the foot of page 4, under the date of "For the month of March 1909, 13,723.040 pounds of grain and other merchandise, at the rate of 35 cents per ton of 2,000 pounds, the sum of \$2,403.11," and so on through month by month until the month of April 1910, when the charge was for \$19,121.475 pounds, at 35 cents per ton, of 2,000 pounds, amounting in the aggregate to the sum of \$42,826.00. We acknowledge

a credit having been paid on account of that sum, being paid on January 24th, 1911, in the sum of \$28,420.19.

Q. How long have you been engaged in the grain business?

A. Since 1880.

Q. How long in connection with the operation of an elevator?

A. Since the same date.

Q. In how many different localities?

A. Philadelphia, Western Maryland; a number of places in Western Maryland.

Q. Are you familiar practically with the operations of an elevator such as the one used at North Philadelphia?

A. Yes, sir; I think so.

Q. You also are familiar with the services rendered by your company to the Pennsylvania Railroad for the period beginning March 1st 1909 to April 30th 1910?

A. Yes, sir.

Q. Based upon your experience would you or not consider thirty-five cents a ton a reasonable or an unreasonable charge for the services rendered by your company to the Pennsylvania Railroad for that time?

A. It would not be high enough, considering the cost of labor and material, but considering it was a continuance of the other contract, I should say it would be a reasonable compensation for that time.

Q. I do not care anything about the continuance of that contract. I want to bring it down to the services rendered between those two dates.

A. Then, for the services rendered between those dates it should be about forty-two and a half cents a ton.

Q. It ought to be seven and a half cents a ton more?

A. Yes, sir.

Q. Why do you say that?

A. I am adding the actual cost plus twenty-five percent profit.

Q. You mean by "actual cost" the total cost of the operation of the elevator and the total receipts therefrom?

A. Yes, sir.

CROSS-EXAMINATION

By MR. BARNES:

Q. Who owns the elevator?

A. The Pennsylvania Railroad Company.

Q. How do you occupy it?

A. Under a lease.

Q. That is, up to March 1st, 1909, you had an agreement in writing with the railroad company for the use and occupation of the premises and for rendering certain services there?

A. Yes, sir.

Q. And thereafter that occupation continued and those services were rendered under the arrangement which you have spoken of in your direct testimony?

A. Yes, sir.

Q. What were those services that you rendered in respect to grain at the elevator?

A. The receiving, the elevating and delivering to the consignees, and collecting the freight, making proper deliveries, and keeping the grain in proper condition, and seeing that the same number of bushels were delivered as received, and the same quality, and so forth, and quantity.

Q. And it is for those services that you make this claim on the basis of thirty-five cents per ton?

A. Yes, sir.

Q. What proportion of that thirty-five cents which you regard as a reasonable compensation represents cost and what proportion represents profit?

A. I should say between thirty-three and thirty-five cents a ton actual cost, and the difference between that and forty-two and a half cents, I should say was the profit.

Harvey C. Miller

Q. In your thirty-five cents, which you claim here, what proportion of that is profit?

A. If the actual cost was thirty-four cents, it would be one cent a ton.

Q. I want to know, without going into the total of your figures, what percentage of the thirty-five cents per ton would represent profit over cost?

A. Very little.

Q. Can you tell us what?

A. Practically nothing, if we took into consideration the fact that we are responsible for shortages and things of that character.

Q. That is risk?

A. Yes, sir; but that should be considered.

Q. I agree with you, but that is compensation. What I want to know is what percentage of the thirty-five cents per ton, as near as you can state it, would represent actual cost?

A. I should say about thirty-four cents a ton would be actual cost, and if we got thirty-five cents that would be a cent profit.

Q. Your total claim, as shown by your statement of claim for this period, was \$42,826. The amount which was paid to you, and for which you give credit to the railroad company, was paid to you on a statement that it was the actual cost incurred by the Keystone Elevator and Warehouse Company, was it not?

A. Not to my knowledge, it wasn't.

Q. You received a voucher for the \$28,420.19 which was paid to you?

A. Yes; but I did not understand that that covered the actual cost.

Q. That voucher read, "For the actual cost incurred by the Keystone Elevator and Warehouse Company"?

A. That might be. I did not so understand it.

Q. "As ascertained and certified by Vollem, Fernley,

Vollem & Rorer, public accountants, in performing the services which the railroad company was required to perform in receiving and handling grain and other traffic at the railroad company's elevator and warehouse, at its North Philadelphia freight station, in the City of Philadelphia and State of Pennsylvania, from March 1, 1909, to and inclusive of April 30th 1910, \$28,420.19. This amount does not include any increment of the claim made by the Keystone Elevator and Warehouse Company for compensation for said services in addition to actual cost, which claim, asserted by the elevator company but not conceded by the railroad company, remains open and unadjusted." You gave the railroad company credit in that amount for a claim which you are now presenting here?

A. We gave them credit for what they paid us. This audit was not made by us at all. It was made by them.

Q. The statement which I have read to you was made by the railroad company on its voucher, which you signed in getting the money or was signed in your behalf and you received the money, but you did not make the statement at all.

A. No.

Q. And it was the railroad company's statement of the amount which they paid on the basis of this voucher?

A. I presume so. We ran along for thirteen months, and we needed the money, and they finally paid us this amount, and, as I understand, Mr. Todd got it and accepted it as a payment on account.

Q. And Mr. Todd was authorized to receipt the voucher on your behalf and get the money for you?

A. Certainly, or he would not have done it.

Q. The balance between your claim and the amount which was paid is \$14,405.81, and the amount which you now claim is \$17,551.04, the difference being \$3,145.23, which is what?

A. That is interest, I suppose.

Harvey C. Miller

Q. The calculation of interest is made upon the amounts due on the first day of each month during the period in suit, which amounts in the aggregate to \$42,826, and that interest on that \$42,826 is calculated up to the date of the payment of the \$28,420.19? Is that correct?

A. Yes.

Q. What part of the service which the Keystone Elevator and Warehouse Company now claims compensation for in respect of this grain is done by the Philadelphia Cleaner Company? What does the Philadelphia Cleaner Company do?

A. Re-conditions the grain.

Q. What do you mean by that?

A. I mean rejected grain that is treated and restored to a higher grade.

Q. Tell us what actually is done. What does the Philadelphia Cleaner Company do? What work does it do?

A. A car load of grain would be elevated, and it would be dropped into this process, this machinery.

Q. Who does the elevation?

A. The elevator company. Then it goes through this by gravity and down until it reaches the storage bins.

Q. And then what happens to it?

A. Then it is treated and goes in the storage bins.

Q. Who does that?

A. The Philadelphia Cleaning Company.

Q. That is its part of the services, is it?

A. Yes, sir.

Q. What is the Philadelphia Cleaning Company? Is it a corporation?

A. No, sir.

Q. What is it?

A. It is a name under which I conduct the business.

Q. What does the Philadelphia Cleaning Company get for that service?

A. It gets a royalty of three-quarters of a cent a bushel.

Q. From the elevator company or from the consignees of the grain—which?

A. I should say they get it from the elevator company and the Elevator gets it from the consignee.

Q. All of that comes to you, does it not?

A. Yes, sir.

Q. Individually?

A. Yes, sir.

Q. And you are also, as you have testified, the largest shareholder of the Keystone Elevator and Warehouse Company?

A. One of the largest, yes, sir.

Q. I thought Mr. Todd asked you whether you were the largest?

A. Well, I think I am, yes, sir. Yes, I am the largest.

Q. There is a difference between "one of the largest" and "the largest."

A. I am the largest.

By MR. TODD:

Q. You hold a majority of the stock, and it is absolutely under your control?

A. Yes, sir.

By MR. BARNES:

Q. Do you hold a very preponderating majority of the stock?

A. I should say yes.

Q. Are there any other substantial shareholders in the Keystone Elevator and Warehouse Company than yourself?

A. Yes, sir.

Q. Do you own seventy-five percent of the stock of that company?

Meeting

A. I think so. I would not like to say exactly, because I am not sure.

Q. We will say approximately? Is that right?

A. I think that is all right.

Adjourned to meet pursuant to agreement of counsel and the Referee.

Meeting held at the office of the Referee, G. Heide Norris, Esq., Land Title Building, Broad and Chestnut Streets, Philadelphia, on Friday, February 28th, 1913, at three o'clock p. m.

Present:

G. HEIDE NORRIS, Esq., *Referee*.

M. HAMPTON TODD, Esq., *representing the Plaintiff*.

GEORGE STUART PATTERSON, Esq., *representing the Defendant*.

After discussion between the Referee and counsel representing the respective parties, the meeting adjourned.

Meeting held at the office of the Referee, G. Heide Norris, Esq., Land Title Building, Broad and Chestnut Streets, Philadelphia, on Monday, April 28th, 1913, at eleven o'clock a. m.

Present:

G. HEIDE NORRIS, Esq., *Referee*.

M. HAMPTON TODD, Esq., *representing the Plaintiff*.

GEORGE STUART PATTERSON, Esq., *representing the Defendant*.

MR. PATTERSON: Mr. Referee, as preliminary to the introduction of evidence contained in the formal offer of proof, a copy of which has been submitted, I desire to call Mr. Robert C. Wright, who is the freight traffic manager of the Pennsylvania Railroad Company, and who is

familiar with the method of handling grain, and other commodities, so far as the question of the delivery of the Railroad Company is concerned, both at Philadelphia and at other points, for the purpose of testifying as to the different methods of delivery of grain and other commodities, which are, in point of fact, delivered through this elevator and warehouse; the reason for the employment of the Elevator Company by the Railroad Company and an explanation of the services performed by the Elevator Company for the Railroad Company, for and on behalf of the consignees of grain and the other classes of property. The object of this offer is to establish, first, the necessity for the employment of the Elevator Company by the Railroad Company, the function which the Elevator Company bears or performs in connection with transportation, and the relation of the Railroad Company to the owners and consignees of grain and other commodities handled through the elevator and Warehouse. This all to be followed by this formal offer as to the profits which the Elevator Company has received at the present time from the operation of the elevator during the period in question.

MR. TODD: The offer of the whole is objected to. There are certain features in it, however, that I recognize might aid the Referee in viewing the character of the services rendered, and the plan through which such services were rendered, and the necessity therefor, which possibly, under a view of this case, might be relevant testimony. With the Referee's permission, however, I will withdraw my objection, with leave, after the testimony is taken, to move to strike out such parts of it as I think are not relevant, and have any exceptions then reserved that may protect my client's rights.

THE REFEREE: Very well. I will grant you that permission.

ROBERT CLINTON WRIGHT, having been duly sworn, was examined and testified as follows:

By MR. PATTERSON:

Q. You are at the present time freight traffic manager of the Pennsylvania Railroad Company?

A. I am.

Q. During the period between March 1st, 1909, and May 1st, 1910, what were your duties?

A. I was general freight agent.

Q. As general freight agent did you have any familiarity with the operation of the Keystone Elevator at North Philadelphia?

A. I believe so; reasonable familiarity with its operations, and a particular knowledge of its relation as a terminal for the Railroad Company.

Q. Prior to your appointment as general freight agent of the Pennsylvania Lines East had you occupied any position with the Company at Baltimore?

A. Yes. I was special agent in the general agent's office for a number of years, ending in 1897, and I was also soliciting agent for about two years.

Q. As such did you have any familiarity with the handling of grain at Baltimore?

A. I did.

Q. When grain is transported from the point of origin over a line of railroad to the point of destination, in what way or ways is delivery made by the Railroad Company to the consignees or owners of that grain?

A. Speaking of grain which is consigned for a railroad delivery, and not to a private siding, and left at that private siding, and that, of course, is delivered to the warehouse of the person and handled in his own way,—but when grain is consigned for public delivery at a railroad station, it can either be delivered direct from cars, the car being placed, and turned over to the consignee for delivery

of the freight, or it can be handled through an elevator, the delivery being made to the consignee by the Elevator.

Q. When you say that delivery is made by the Elevator, what do you mean by that?

A. If you would like me to go more fully into the—

Q. In a very general way.

A. Simply that in order to release the cars, instead of being placed on the track subject to the consignee's option of unloading, they are delivered to an Elevator and unloaded at once into the bins of that Elevator, and there subject to the consignee's order; the Elevator, in turn, delivering it to the consignee or his order, at his wish and desire, subject to the charges for the service performed.

Q. As a general proposition, does the Railroad Company have an elevator for local delivery and an elevator for export delivery?

A. We have at important places, like Philadelphia and Baltimore.

Q. What is the elevator which was employed by the Pennsylvania Railroad Company to perform this local delivery at Philadelphia?

A. The Keystone Elevator, at North Philadelphia.

Q. What other facilities did the Keystone Elevator and Warehouse Company provide for the Railroad Company at North Philadelphia?

A. Included in the lease to them of the Elevator was part of an old warehouse at North Philadelphia, which represented that part of the contract referring to the warehouse business. It represented it in a very small way.

Q. That warehouse was used for what purpose?

A. For a terminal of the Railroad Company. In other words, the cars consigned to the warehouse are placed there and unloaded at once into that, to release the cars.

Q. Unloaded by whom?

A. Unloaded by the Warehouse Company into the warehouse, and through that warehouse delivery is made to the consignees.

Robert Clinton Wright

Q. As a general rule, carload freight is unloaded by whom?

A. As a general rule, carload freight is unloaded by the consignor, loaded by the shipper and unloaded by the consignor.

Q. How is it that in this particular instance the car load freight is handled by the Warehouse Company and not by the Railroad Company?

A. At certain large points, governed by different competition, the Railroad Company undertakes to unload certain classes of carload freight, and by our published tariff that is the case in Philadelphia. We unload this carload freight for consignees.

Q. And you employed the Elevator and Warehouse Company to perform the service for you?

A. In this particular locality, that is our terminal that performs it for us.

Q. Grain having been unloaded from the cars into the elevator as described by you, what may or may not happen to that grain?

A. If I understand your question, the grain unloaded into the Elevator is subject either to delivery without any further handling or treatment, or it is subject to various workings, as shown in the tariff of the Railroad Company. That is to say, it can be turned or blown or dried, mixed before delivery, or bagged upon delivery. Various different treatments are offered, at the proper charge. All of which could not be given if the grain were delivered directly from the car to consignee. It is an additional attraction in the handling of grain, to have those privileges.

Q. When the grain is handled as you have described, from the car into the Elevator, is the handling covered in the ordinary freight rate, or is there a specific charge therefor in addition to the freight rate?

A. The tariff of the Elevator shows the charge, which does not mean simply the unloading, but includes receiving, weighing and storing, including the first ten days storage

and delivery to cars or wagons, for which the charge is one-half cent per bushel.

MR. PATTERSON: I offer in evidence the Tariff referred to by the witness, being I. C. C.-G, No. 2953, taking effect April 17th, 1907.

(Tariff marked, "Exhibit A, G. H. N.")

Q. Has this Elevator in it any machinery operated by any company or concern other than the Elevator Company?

A. Yes, sir. It has machinery in it operated by the Philadelphia Cleaner Company.

Q. I direct your attention to the Tariff, Item No. 1, being one-half cent per bushel for receiving, weighing and storing from cars, including first ten days' storage and delivery to cars or wagons. Is the service involved in that item performed by the machinery of the Elevator Company?

A. Yes. According to my understanding that service is performed by the Elevator Company machinery.

Q. Will you take each of those items.

A. Item No. 2, storage each succeeding ten days or fraction thereof. That is, of course, stored in the Elevator.

Item No. 3, blowing, screening or mixing in store (additional). I understand that to be the machinery of the Elevator.

Item No. 4, turning in store (additional). I understand that to be the Elevator.

Item No. 5, drying No. 2 grade of any kind of grain. This I understand to be a function of the Philadelphia Cleaner Company.

Item No. 6, stacking, in lots of 1,000 bushels or over, including transfer through Elevator, and blowing, but no storage beyond forty-eight hours after completion of service. This I understand, is the function of the Elevator.

Item No. 7, drying other than No. 2 grades, including transfer through the Elevator, and bagging, if desired, but

Robert Clinton Wright

no storage beyond forty-eight hours after completion of service. This I understand to be the work of the Philadelphia Cleaner Company.

Item No. 8, cooling, including transfer through the Elevator, and bagging, if desired, but no storage beyond forty-eight hours after completion of service. This I understand to be the work of the Philadelphia Cleaner Company.

Q. Does the consignee, under that Tariff—I direct your attention to it—pay anything for elevation in addition to the charges specified therein?

A. As I understand, the Tariff on these charges are the entire charges made against the owner for the work as shown.

Q. Item No. 3 and Item No. 4, take those.

A. It specifies absolutely that it is in addition to the half cent paid for the receiving, weighing and storing.

Q. Those are the only items on the Tariff which are specified as additional?

A. That is correct.

MR. PATTERSON: Mr. Todd, you may cross examine Mr. Wright.

MR. TODD: Reserving the right of objection, as heretofore indicated, I will proceed with the cross examination.

CROSS-EXAMINATION

By MR. TODD:

Q. In a general way, the situation is like this, is it not: The Pennsylvania Railroad leases this Elevator to the Keystone Elevator and Warehouse Company, the plaintiff in this action?

A. That is correct.

Q. And charges them a rental therefor?

A. Yes, sir.

Q. This case involves the question of what is a

reasonable compensation for the services rendered by the Elevator Company to the Railroad Company in connection with the transportation services at that Elevator, does it not?

A. I am not entirely familiar with the whole gist of this case. That is my understanding, from what I have heard.

Q. The charges to which you refer as being in the Tariff are the charges that are made to the public, are they not?

A. They are.

Q. They have nothing to do with the question of what is or is not a reasonable compensation, as between the Railroad Company and the Keystone Elevator Company for the services rendered by that Company?

(Objected to as a question of law.)

(Question withdrawn.)

Q. There is no provision in this Tariff, is there, for what is compensation for the Elevator Company for the services rendered to the Railroad Company?

A. No rates on this Tariff as to a payment by the Railroad Company to the Elevator Company.

Q. Prior to the first of February, 1909, there was a contract subsisting between the Elevator Company and the Railroad Company regulating that proposition, was there not?

A. There was.

Q. And since the first of May, 1910, there has been a contract regulating that?

A. There has.

Q. The period between the first of February, 1909, and the first of April, 1910, the services were rendered but there was no contract fixing the rate of compensation?

A. No contract alive during that period.

Robert Clinton Wright

Q. No contract alive during that period?

A. No.

Q. What is Item No. 1 on that Tariff?

A. Receiving, weighing and storing from cars, including first ten days' storage and delivery to cars or wagons.

Q. That is intended to cover, is it not, after the cars have arrived at the Elevator Station, the charge made to the public for unloading that car, for placing it in the bins, for the free storage period, and the delivery of that grain within the free storage period to the consignee or his order?

A. That charge is the charge against the consignee for those combined services.

Q. And that is a portion of the services that the Railroad Company has undertaken to do for the shipper or the consignee, as the case may be.

A. Let me get clear on that. Do you mean that those services would ordinarily be included in the transportation?

Q. No. I did not ask you that.

A. I do not want to get confused. You mean that we have undertaken to furnish this to the consignee at the proper charge and through the proper facility?

Q. Yes. You have undertaken to do that as a portion of your service to the consignee, or the consignor, as the case may be?

A. With a proper charge therefor, not included in the freight rate.

Q. That service, the actual unloading of the car, putting it in the bin, and the reloading of it out of the bin, has to be performed by the Elevator Company?

A. That is correct.

Q. And for that service, prior to the first of February 1909, the Railroad Company made a contractual allowance to the Elevator Company?

A. It did. I would not like to say it was for that purpose exactly. My understanding is it was an allowance

Robert Clinton Wright

made to the Elevator Company for whatever work the Railroad would have had to perform itself if it had run the Elevator, with due regard for what it might charge the public.

Q. Would that include the treatment of sick grain?

A. No.

Q. That would be within the general language that you have used a moment ago?

A. What I wanted to convey was that the payment for a facility of that kind very often depends on what that facility can collect itself. What it can collect is more or less subject to the will of the Railroad carrier, because if the facility so employed attempts to collect more than is fair and proper, under the rules of the City, then it makes some difference in what might be allowed by the carrier.

Q. You mean by that expression, that the Railroad Company attempts to control the charges of its tenant.

A. It has some supervision over it.

Q. That is a supervision which would amount to a certain amount of control over it? Is that it?

A. A certain amount of control over it, yes.

Q. With the view that the public might be treated fairly? I presume that is the fundamental thought?

A. Exactly so; that the interests of the carrier should not be interfered with.

Q. Which, if the public were not treated fairly, they would be interfered with?

A. That is correct.

Q. You have included in that tariff, to which you have just called attention, services which you have designated as being performed by the Philadelphia Cleaner Company?

A. Yes, sir.

Q. That is the service that is rendered after the grain has been fully delivered into the Elevator, under paragraph 1 of the tariff, to which you have referred?

Meeting

A. That is my understanding of it.

Q. And rendered at the request of the owner?

A. Yes, sir.

Q. It may or may not be rendered, just as the owner requires?

A. Yes, sir.

Q. The same thing may be said as to mixing, may it not?

A. Yes, sir.

Q. And clipping?

A. Yes, sir.

Q. And all the other various services rendered at the owner's request for the purpose of marketing the article that he has delivered to the Elevator?

A. Yes, sir.

After discussion between the Referee and counsel representing the respective parties, the meeting adjourned.

Meeting held at the office of the Referee, G. Heide Norris, Esq., Land Title Building, Broad and Chestnut Streets, Philadelphia, on Thursday, June 5th, 1913, at 11 o'clock A. M.

Present:

G. HEIDE NORRIS, Esq., *Referee.*

M. HAMPTON TODD, Esq., *representing the Plaintiff.*

GEORGE STUART PATTERSON, Esq., and

JOHN HAMPTON BARNES, Esq., *representing the Defendant.*

MR. PATTERSON: The defendant offers to prove that during the time embraced within the Plaintiff's statement, to wit, from March 1st, 1909, to May 1st, 1910, the capital stock of the Keystone Elevator & Warehouse Company, the Plaintiff in this case, was Ten Thousand (10,000) shares at Ten (10) Dollars each, all of which was issued and outstanding, and that during the said time Nine Thousand three

hundred and sixty (9360) shares of said stock, at a par value of \$93,600 was the property of Mr. Harvey C. Miller; that during the period in question, the said Harvey C. Miller was a member of the firm of L. F. Miller & Sons, who were shippers, consignees, and dealers in grain, and that during the period in question 90 per cent of the business elevated, stored and handled through the elevator and warehouse of the Plaintiff Company at North Philadelphia, as referred to in the statement of claim, was grain elevated, stored and handled for and on account of the said firm of L. F. Miller & Sons, and for compensation for the elevation, storage and handling of which and the grain and merchandise of other owners and consignees through said elevator and warehouse this suit is brought, as is more specifically detailed in plaintiff's statement; that said grain, the property of L. F. Miller & Sons and other owners, as aforesaid, and for the elevation, storage and handling of which through the Keystone Elevator this action was brought, was grain which was shipped (at the tariff freight rates) from points in States other than Pennsylvania over the lines of the Defendant Company to said Keystone Elevator, and delivered by the Defendant to the Plaintiff Company, who, in turn, elevated the same into the elevator and performed various other services with respect thereto, as more particularly detailed in the tariff hereinafter referred to; and that other grain dealers and consignees of grain, competitors of L. F. Miller & Sons, located in the City of Philadelphia, received grain transported over the lines of the defendant from the same points as mentioned in paragraph 3 of this offer, and on which they paid the same freight transportation rate as that paid on grain of L. F. Miller & Sons, and that said other grain dealers and consignees did not have any elevator nor perform any elevator service in connection with such grain, and accordingly did not receive any compensation therefor.

MR. TODD: I call upon counsel for the defendant to state the purpose of these offers.

MR. PATTERSON: The object of these offers is to show that there is an identity of interest between the principal stockholder of the Keystone Elevator Company, Harvey C. Miller, and the firm of L. F. Miller & Sons, who are in the grain business, and that being in the grain business, the Railroad Company is, under the Interstate Commerce Act, limited, with respect to the amount of compensation which it is permitted to pay the plaintiff company for services performed on behalf of the defendant company. This offer to be followed by the subsequent offers, that the amounts already received by the plaintiff company from the defendant company and their consignees for the performance of the services in question constitutes a reasonable compensation for those services.

MR. TODD: I object to those offers of proof, because the question which the Referee is called upon to try is what is a reasonable compensation for the services rendered by the plaintiff to the defendant, and that the proposed offers of proof are irrelevant and immaterial, and furnish no assistance to the Court in the determination of that question.

THE REFEREE: I will sustain the objection.

(Exception noted for defendant, by direction of the Referee.)

MR. PATTERSON: The defendant also offers to prove from the books of the plaintiff company that the Plaintiff Company and the said Harvey C. Miller, as the owner of 93.6 percent of the capital stock of the said Company, have already received by reason of the payment made by the Defendant to the plaintiff, as averred in the Plaintiff's statement, and the payments made to the Plaintiff by consignees and owners under the tariff (admitted in evidence) for

the performance by the Plaintiff of the various services agreed to be performed by the plaintiff for the defendant, and for the performance of which this action is brought, the cost of such performance, as well as a reasonable profit in addition to said cost, and that the further payment demanded by the said Plaintiff Company for the performance of said services is forbidden by the provisions of the Act of Congress, entitled, "An Act to Regulate Commerce" approved February 4, 1887, its amendments and supplements, as well as the Act of Congress entitled "An Act to further regulate commerce with foreign nations and among the States," approved February 19, 1903, its amendments and supplements.

MR. TODD: In connection with that offer, I ask counsel to state the purpose of it.

MR. PATTERSON: The purpose of that offer is, as stated explicitly in the offer, namely, an offer to prove from the books of the Plaintiff Company that the Plaintiff Company has already received the costs of the performance of the services contracted for, plus a reasonable profit, by virtue of the payment made by the Railroad Company, as referred to in the Plaintiff's statement, and by virtue of the further payments made by consignees under the tariff admitted in evidence to the plaintiff company for the performance by the plaintiff company of the various services, which, under the contract with the defendant, the plaintiff had agreed to perform.

MR. TODD: I understand by the use of the words "reasonable profit in addition to cost" that you mean to include payments made by parties other than the Railroad Company for services rendered to them as a portion of the reasonable compensation rendered to the Railroad Company. Am I correct in that?

MR. PATTERSON: You are correct in understanding that there is included in the above amounts paid by consignees and owners of grain to the plaintiff company, under the terms of the tariff of the defendant company, for the performance by the plaintiff company of services which the plaintiff company agreed with the defendant to perform, and for the performance of which this suit is brought.

MR. TODD: I am not clear from counsel's statement as to the scope of their offer. It is true that the plaintiff company agreed with the Railroad Company that it would render services to other shippers and consignees and charge the tariff rates, but the payments made by shippers under that agreement are no part of the compensation which was agreed to be paid by the Railroad Company for the services rendered for the benefit of the Railroad Company alone, and therefore, I want, before making my general objection to the point, to know from counsel whether i have correctly apprehended their offer of proof.

MR. PATTERSON: The Plaintiff in its statement alleges that the plaintiff agreed to furnish, at its own cost, all manual labor which should be required to promptly load and unload the cars of the defendant at the elevator and warehouse and to handle promptly and effectively all traffic delivered to it by the defendant. For the performance of those services the plaintiff has been paid by the defendant the amounts stated in the plaintiff's statement, and has in addition thereto received certain amounts from consignees for these services, the sum of these payments exceeding the actual cost of the performance of these services, plus a reasonable profit.

The whole question is this: The defendant contends that in determining what the plaintiffs entitled to recover in this case as a reasonable compensation, the Referee must take in consideration the payments made to the plaintiff company by the owners and consignees of grain, under the

tariff in question, for the performance of the services which the plaintiff agreed with the defendant to perform, and for the performance of which the defendant agreed to pay the plaintiff a reasonable compensation.

MR. TODD: I object to this offer of proof, first, as not stating with sufficient explicitness the conclusions of fact or the facts from which the conclusions are drawn, to enable the Referee to intelligently pass upon the question of the relevancy of the facts therein set forth. I also object to it, as immaterial and irrelevant, and as furnishing no assistance to the Referee in determining the only question in issue, which is pending before him for his determination, namely, what is a reasonable compensation for the services rendered by the plaintiff to the defendant, as set forth in the statement of the plaintiff's cause of action.

THE REFEREE: The objection is overruled for the present.

(Exception noted for plaintiff, by direction of the Referee.)

MR. PATTERSON: The defendant offers in evidence a duly authenticated copy of the opinion, report and order of the Interstate Commerce Commission, decided January 7, 1913, dealing with the operation of the said Keystone Elevator by the Keystone Elevator & Warehouse Company during the period covered by this suit, as well as the lease and contract with the Defendant Company under which the Plaintiff has operated the same, and making an order against said Defendant forbidding the leasing of said elevator to the plaintiff or the payment of any allowance for its services upon any property passing through said elevator or warehouse belonging to a stockholder of said Plaintiff Company, unless tariffs of the Defendant should embrace similar privileges to all other shippers using this or any other elevator in the City of Philadelphia.

Walter F. Sims

MR. TODD: I object to that as irrelevant and immaterial.

THE REFEREE: I will admit the offer for the present. The objection is overruled.

(Exception noted for plaintiff, by direction of the Referee.)

WALTER F. SIMS, heretofore sworn, recalled, and examined and testified as follows:

By MR. PATTERSON:

Q. Have you had occasion to make an examination of the books of the Keystone Elevator Company?

A. I have.

Q. When was the examination made, and it covered what period?

A. The examination covered a period of some months. It started in the latter part of August, 1911, and extended on up, in connection with Mr. Fernley, until about the 15th of January, 1912.

Q. What period in the books was examined?

A. The period in the books examined covers the period from March 1st, 1909, to April 30th, inclusive, 1910. Fourteen months.

Q. Have you from time to time on occasions since examined the books of the Elevator Company?

A. I have.

Q. Are you familiar with the method of keeping their accounts?

A. Yes, sir.

Q. Are you engaged at the present time in co-operation with the Elevator authorities?

A. I am.

Q. In doing what?

A. In installing a new bookkeeping method.

Q. Have you made an examination of the plant and equipment and facilities of the Elevator Company?

A. Yes.

Q. Are you familiar with the plant, equipment and facilities of the elevators of the Railroad Company at other points?

A. I am.

Q. What points?

A. Philadelphia and Baltimore.

Q. How is grain unloaded from the cars of the Railroad Company into the Elevator at North Philadelphia?

A. The car is switched into the Elevator house by an engine from the yard, taken from the yard and placed in the house, and the grain door is opened, usually by cutting it. The grain in the full car trickles through the broken door until such time as the gravity will not take it any further, and then men are placed in the car with unloading shovels, and the grain is pulled out with these unloading shovels, which work automatically from the power of the Elevator Company, and it goes down, falls down into the receiving pit, and from there it is elevated by means of an endless belt, to which is attached buckets holding a given amount, and taken up to the extreme top of the elevator, where it is placed in a garner, which receives the grain from the unloading pit.

Q. That service of unloading cars for the Railroad Company at North Philadelphia is performed by whom?

A. That service of unloading cars at North Philadelphia is performed by the Keystone Elevator Company.

Q. Is or is not that grain which goes into that elevator elevated?

A. It has to be, as it goes into the elevator.

Q. And elevated?

A. And elevated.

Q. That includes the grain coming from cars of the Railroad Company?

A. All cars coming from the railroad company. In

connection with the elevation, it is then dropped down into the weighing scales, one below the garner, and after the weight is obtained it is then shot down, by gravity, through the legs of the elevator, that is, the chutes of the elevator, into bins provided, if it is not desired to perform other service on that grain. If it is, it is simply diverted from its course, and it still keeps on going down, by its weight or gravity, through the other processes.

Q. Can any grain be treated by the machinery of the so-called Philadelphia Cleaner Company without first being elevated?

A. It cannot.

Q. Turn briefly to the question of handling property through the Warehouse of the Keystone Elevator Company at North Philadelphia.

A. What property? Flour or hay?

Q. Any commodity. Take flour.

A. We will take flour. Flour is unloaded from the car by the Keystone Elevator and Warehouse men, and it is trucked through the space and placed on wagons that are sometimes awaiting to have the commodity of flour placed thereon. Other times, when the wagons are not awaiting, the flour is unloaded and placed in what they call the storage room there, a small storage room.

Q. Mr. Wright testified that under the tariffs the Railroad Company had obligated itself to shippers to unload a carload of freight through the warehouse. Who performs that service at North Philadelphia for the Railroad Company?

A. The Railroad Company at North Philadelphia has its own agency, and also an agency which is hired. The Keystone Elevator and Warehouse Company are the accredited agents for the handling of certain commodities there, which are flour, grain, hay, and so on.

Q. In other words, the Keystone Elevator Company performs this service for the Railroad Company?

A. Yes, sir.

Q. Which the Railroad Company, under its tariffs, is obliged to perform?

A. That is right.

Q. Are you familiar with the tariff of elevator and other charges filed by the Railroad Company at North Philadelphia?

A. I am. I have one in front of me.

Q. Before turning to that tariff I ask you what do the books of the Elevator Company show as to the cost of the operation of the Plaintiff Company during the period between March 1st, 1909, and May 1st, 1910.

A. They show that the plaintiff Company's cost to operate was \$36,935.69.

Q. Do the books of the Plaintiff Company separate the items of expense applicable to the various services performed by it? For example, are they kept separate?

A. No; they are bulked.

Q. So as to show elevation, storage, etcetera?

A. No.

Q. In what way are the accounts kept, and what do they show?

A. Sundries, coal, oil, rents, labor, salaries of the president and superintendent.

Q. Does this item of expense, therefore, of \$36,935.69 include every item of expense which the Elevator Company has incurred during the period in question?

A. Every item of expense, as appearing on their books.

Q. I will ask you to turn to this tariff. I direct your attention to Tariff Item No. 1, namely, "Receiving, weighing and storing from cars, including first ten days' storage and delivery to cars or wagons." Is that the service of elevation which you have just described?

MR. TODD: I object to that. It is not for him to say what the service was, or to construe the tariff. It is for him to tell what the books show for the receipts. I object to

his putting any construction upon this tariff, or as to what services were included in it. He is now testifying to what the books show were the receipts.

MR. PATTERSON: Let me put the question in another way.

By MR. PATTERSON:

Q. Was the service which is embodied in this item in the tariff performed by the machinery and the employes of the Elevator Company?

MR. TODD: I object to that. He is called as a witness to prove accounts. I object to his competency to testify to that. He has not been qualified as an expert.

MR. PATTERSON: We will take his figures first.

By MR. PATTERSON:

Q. What was the amount of the payment made by the Railroad Company to the Elevator Company for the performance of the services rendered by the Elevator Company during the period covered by this suit?

A. We have paid \$28,420.19.

Q. What amounts did the Elevator Company receive from consignees for the elevation of non-treated grain under Tariff Item No. 1?

MR. TODD: Let me cross examine him on that.

By MR. TODD:

Q. Is there any account on the books of the Keystone Elevator and Warehouse Company showing the facts which the question of counsel is directed to? I want to know whether there is an account. Do you know whether there is or not?

A. I will tell you in a minute, and not before that minute. I have a record—

MR. TODD: I object, and I insist upon a categorical answer to my question.

THE REFEREE: Answer the question yes or no, and explain it afterwards.

A. There is a record of grain not treated at North Philadelphia in the Elevator records.

By MR. TODD:

Q. I ask for a specific answer to my question. Is there an account on the books of the Keystone Elevator Company set apart for the purpose of determining whether it has been treated or not treated?

A. I will ask you a question.

Q. No. You will answer my questions and not ask me anything.

A. I do not understand your question. I cannot answer it until I understand you.

Q. I will repeat it again. I ask you if there is any book in the Keystone Elevator and Warehouse Company or any account in any book in which the details appear of non-treated grain?

A. There is a book up at North Philadelphia—

Q. Called what?

A. It won't be called a book. It is a weigh-master's sheet, made by the weigh-master, which shows non-treated grain.

Q. And your figures are calculations made by you and deductions made by you from those sheets?

A. Those sheets made by the Elevator people.

MR. TODD: I object to that. I want the originals of that kind of thing here.

By MR. PATTERSON:

Q. State what the books show.

MR. TODD: As to what point?

MR. PATTERSON: As to this last point.

MR. TODD: I object to that.

Walter F. Sims

By MR. PATTERSON:

Q. I ask you if there is any account, and what it shows?

A. There is an account.

By MR. TODD:

Q. The weigh-master's sheet, from which you have made a calculation?

A. From which I made a calculation.

By MR. PATTERSON:

Q. Suppose you answer the question, and perhaps the Referee can determine it.

MR. TODD: I reserve the right to strike it out, if it shows to be a calculation.

The following question read:

"Q. What amounts did the Elevator Company receive from consignees for the elevation of non-treated grain under Tariff Item No. 1?"

A. \$3,976.45.

By MR. TODD:

Q. Is that the result of a calculation?

A. Why, twice one are two.

Q. This was the result of a calculation?

By MR. PATTERSON:

Q. Can't you state what the books show?

A. The books show that the initial elevation charges of half a cent were \$26,795.04. But the books also show that on the half cent grain there were 5,359,008 total bushels, and of that amount 4,563,718 bushels their books

show as treated. That can be sub-divided into the total bushels handled.

MR. TODD: That is what I object to.

By THE REFEREE:

Q. You say that can be sub-divided?

A. No. That is sub-divided.

MR. TODD: By his calculation. That is what I want to get at.

THE WITNESS: No. By the books.

By MR. TODD:

Q. It is a calculation made by you upon the books, is it not?

A. Isn't that the same thing?

MR. TODD: No; It is not. That is just the point I have been trying to get you to say.

By THE REFEREE:

Q. What do the books show?

A. I will tell you what the books show, then. The books show that there were 5,359,008 bushels of half cent grain handled. The books also show that 4,563,718 bushels were treated.

By MR. ATTERTON:

Q. What do you mean by "treated" and "not treated" in your answer to that question?

A. I presume "treated" means drying. I know of no other analysis of "treated" than drying.

Q. Will you read into the record what these other receipts of the Elevator Company were, as shown by the books?

A. The initial charges at one cent were \$919.26.

By MR. TODD:

Q. Where have you made that correction?

A. If you will look over Mr. Fernley's subsequent analysis to you, you will find it is in there.

Q. That was a correction made by you and Fernley, was it?

A. That was a correction made by Mr. Fernley and myself.

(Witness withdrawn for the present.)

Adjourned until Thursday, June 12th, 1913, at 11 o'clock A. M.

Meeting held at the office of the Referee, G. Heide Norris, Esq., Land Title Building, Broad and Chestnut Streets, Philadelphia, on Wednesday, July 9th, 1913, at 11 o'clock a. m.

Present:

G. HEIDE NORRIS, Esq., *Referee.*

M. HAMPTON TODD, Esq., *representing the Plaintiff.*

GEORGE S. PATTERSON, Esq., and

JOHN HAMPTON BARNES, Esq., *representing the Defendant.*

Counsel representing the respective parties presented to the Referee a signed stipulation under date of July 9th, 1913, showing receipts and disbursements by the Keystone Elevator & Warehouse Company as per the respective items set forth in the stipulation, covering the period embraced in this suit, as well as the receipts and expenditures of Harvey C. Miller, trading as the Philadelphia Cleaner Company.

Mr. Todd, on behalf of the plaintiff, objects to the facts set forth in this stipulation on the ground that they are

not relevant to any issue that is now being tried before the Referee.

(Objection overruled.)

(Exception noted for plaintiff, by direction of the Referee.)

The stipulation is as follows:

STIPULATION

AND Now, July 9th, 1913, it is stipulated between the parties to this cause that the books of the plaintiff company show the following for the period between March 1st, 1909, and April 30, 1910.

I. EXPENSES

| | |
|----------------|-------------|
| Sundries | \$5,012.68 |
| Coal | 2,847.62 |
| Oil | 177.89 |
| Rents | 7,872.50 |
| Labor | 17,975.00 |
| Salaries | 3,050.00 |
| <hr/> | |
| Total | \$36,935.69 |

That during the same period of time the expenses of the Cleaner Company were \$3,169.00.

II. RECEIPTS

| | |
|-------------------------|-----------|
| Item #1 on tariff | 3,976.45 |
| “ #2 “ “ | 2,300.55 |
| “ #2 “ “ | 6,335.31 |
| “ #4 “ “ | 22.14 |
| “ #5 & #6 “ | 22,818.59 |
| “ #7 & #8 “ | 919.26 |

79a
Stipulation

93

| | |
|--|-------------|
| Sub-letting leased property | 415.00 |
| Weighing on wagon scales | 156.72 |
| Steam heat sold to Railroad Co. | 1,605.88 |
| Warehouse Storage (Not elevator) | 919.80 |
| Charges at $\frac{1}{4}$ ¢ per bushel | 53.57 |
| Received from wagons at $\frac{1}{2}$ ¢ per bushel | 3.19 |
| " " " " 1¢ " " " | 35.22 |
| Transferring lading of car for Railroad Co. | 5.00 |
| Clipping oats | 585.95 |
| Cleaning grain | 7.05 |
| Treating grain | 2,119.46 |
| Cooling " | 9.77 |
| Shelling " | 46.92 |
| Carting | 1.25 |
| Drying grain | 2,159.70 |
| " " " " at 1¢ | 511.14 |
| " " " " at 2¢ | 39.50 |
| " " " " at 5¢ | 23.00 |
| Cracking | 852.01 |
| <hr/> | |
| Total | \$45,922.43 |

That during the same period of time the Elevator Company paid Mr. Harvey C. Miller the sum of \$35,060.08 for the right to use in said elevator certain patented processes for cleaning and otherwise treating grain, said payment being at the rate of 3-4¢ per bushel on all grain so cleaned or treated.

M. HAMPTON TODD,
Atty. for Pltff.

JOHN HAMPTON BARNES
Atty. for Defendant.
July 9, 1913."

HARVEY C. MILLER, heretofore sworn, recalled, as under cross examination, was examined and testified as follows:

By MR. PATTERSON:

Q. Will you turn to Tariff Item No. 1, being, "Receiving, weighing and storing from cars, including first ten days storage and delivery to cars or wagons." Who performs that service?

Mr. Todd objects to this examination, on the ground that it is irrelevant and immaterial.

(Objection overruled.)

(Exception noted for plaintiff, by direction of the Referee.)

It is agreed by counsel for the respective parties that the subsequent examination on this line is taken subject to Mr. Todd's objection, without renewing the objection from time to time.

A. The Elevator Company.

Q. Is that service performed in whole or in part by the machinery or employes of the Philadelphia Cleaner Company?

A. Largely by the Elevator Company.

Q. Is it performed at all by the Cleaner Company?

A. In some instances it may be.

Q. Please look at this tariff again.

A. I know what you mean. Technically the tariff does not show it. I want to illustrate that: When the chief grain inspector orders the grain to grade a certain grade under that item, it is blown.

Q. Please look at the Tariff Item No. 1. You are talking about something entirely different.

A. It is not here. I am trying to give you the actual facts that happen with grain.

Q. Under Tariff Item No. 1 the consignee of grain is entitled to what service?

Harvey C. Miller

A. He is entitled to the service that you have just read, and in addition he is entitled to a blow if the chief grain inspector so instructs.

Q. Does the Tariff say so there?

A. No; the Tariff does not.

Q. Then, you mean that service was being given to the consignee which was not comprised in the Tariff?

A. Yes, sir. It is a custom, and has been for twenty years to my personal knowledge, to do it.

Q. You mean that the service is given there free?

A. Yes, sir.

Q. Have you got a separate tariff item there which covers the service of blowing?

A. Yes, sir; after it is installed.

Q. Item No. 2, being, "Storage each succeeding ten days or fraction thereof." Who performs that service?

A. There is no service to be done there. That is simply to hold the grain in the bins of the elevator.

Q. Is the space for the storage furnished by the Elevator Company or by the Cleaner Company?

A. By the Elevator Company.

Q. Item No. 3, being "Blowing, screening or mixing in store (additional)." Is that service performed by the Elevator Company or by the Cleaner Company, or by both?

A. By both companies.

Q. What is the nature of the service performed by each?

A. The machinery of the Philadelphia Cleaner Company will do the blowing and cleaning, as well as the mixing, and the Elevator Company has machinery, under certain conditions, to do the same thing.

Q. Then, you mean that that tariff item, "Blowing, screening or mixing in store (Additional)" may represent either service performed by the Cleaner Company or service performed by the Elevator Company?

A. Yes, sir.

By THE REFEREE:

Q. What does the word "Additional" mean there?

A. It means in addition to the half-cent a bushel. After it is in storage.

By MR. PATTERSON:

Q. Does it mean that it is a charge additional to the half cent charge which is imposed for elevation?

A. Yes, sir. If grain on the half cent charge is ordered on the elevator and the chief grain inspector says, "Blow that," it is blown, and no charge is made, because it is done at that elevation. This would require another elevation, to do this work, and that is why the charge is made as it is.

Q. Item No. 4, being, "Turning in Store (Additional)." That is done entirely by the Elevator Company's machinery, and the charge there is additional to the half cent charge for elevation?

A. Yes, sir. Unless it is ordered by the chief grain inspector for the purpose of examining the grain, and then there is no charge made. But when the consignee makes a request, then this charge is imposed on him.

Q. Which charge?

A. This turning charge of a quarter of a cent.

Q. Item No. 5 being, "Drying No. 2 grade of any kind of grain." That service is performed by whom?

A. That service is done largely by the Philadelphia Cleaner Company.

Q. How much of the service or what part of the service is performed by the Elevator Company?

A. There is none of that performed by the Elevator Company.

Q. The entire drying of No. 2 grain is performed by the Cleaner Company?

Harvey C. Miller

A. No; not the entire amount of it, I should say. A portion is done by machinery belonging to the Railroad Company.

Q. You mean by that, leased to the Elevator Company?

A. Yes, sir.

Q. What portion is that?

A. I could not answer that right.

Q. In Tariff Item No. 5, "Drying No. 2 grade of any kind of grain," the elevation which is involved there is performed entirely by the Elevator Company, is it not?

A. Yes, sir. The elevation that is involved is performed, certainly, by the Elevator Company.

A. And there is no separate and distinct charge for elevation in addition to this half cent?

A. No. There is no charge made for elevation.

Q. Item No. 6, being, "Sacking, in lots of 1000 bushels or over, including Transfer through Elevator, and Blowing; but no Storage beyond 48 hours after completion of service." Who performs that service?

A. That is performed partly by the Elevator Company and partly by the Cleaner Company.

Q. What is the nature of the service performed by the Cleaner Company?

A. The blowing.

Q. The entire balance of the service, including elevation, is performed by the Elevator Company?

A. Excepting the screening. It is possible that some of the screening might be done by the Cleaner Company.

Q. Item No. 7 being, "Drying other than No. 2 grades, including Transfer through the Elevator, and Bagging, if desired; but no storage beyond 48 hours after completion of service." Who is that service performed by?

A. By both companies, the Elevator Company and the Cleaner Company.

Q. How much of the service is performed by the Cleaner Company?

A. The drying.

Q. The balance of the service is performed by the Elevator Company?

A. Yes, sir.

Q. The same question with reference to Tariff Item No. 8, being, "Cooling, including Transfer through the Elevator, and Bagging, if desired; but no storage beyond forty-eight hours after completion of service?"

A. That is performed jointly by the Elevator Company and by the Cleaner Company.

Q. How much of it is performed by the Cleaner Company and how much by the Elevator Company?

A. The cooling is performed by the Cleaner Company.

Q. The balance is performed by the Elevator Company?

A. Yes, sir.

Q. Turning back to Tariff Item No. 1, being, "Receiving, Weighing and Storing from Cars, including first 10 days storage and Delivery to cars or wagons." The receiving from the cars is performed by whom, the Elevator Company or the Cleaner Company?

A. The Elevator Company.

Q. And the weighing is performed by whom?

A. By the Elevator Company.

Q. And the storing is performed by whom?

A. That is performed by the Elevator Company.

Q. And storage and delivery to cars or wagons?

A. That is performed by the Elevator Company.

Q. I think you testified before, but perhaps my recollection is incorrect, that all grain which is handled through the elevator has to be elevated from the cars?

A. Yes, sir.

Q. That is correct, is it not?

Harvey C. Miller

A. Yes, sir.

Q. And the elevation service is one of the services which the Railroad Company employed the Elevator Company to perform?

A. Yes, sir.

Q. I do not think it appears very clearly on the record as to what is the relation between the Elevator Company and the Cleaner Company. Does the Elevator Company employ the Cleaner Company to perform certain services to the Elevator Company, or does the Elevator Company use the patented processes of the Cleaner Company and pay a royalty?

A. They use the patented process and pay a royalty, and they furnish some of the men.

Q. Who furnishes some of the men?

A. The Cleaner Company.

Q. The furnishing of those men, the charge for that is included under the royalty of three quarters of a cent a bushel?

A. Yes, sir.

Q. What would be the cost of the duplication of the plant of the Cleaner Company?

(Objected to by Mr. Todd.)

(Objection overruled.)

(Exception noted for plaintiff, by direction of the Referee.)

A. I could not answer that without going into it a little more carefully.

Q. Would \$25,000 duplicate the machinery?

A. I should say yes, if nothing is charged off for experimental purposes, and so forth. Twenty-five to thirty thousand dollars.

Q. Assuming that something is charged off for ex-

perimental purposes, would fifty thousand dollars duplicate it?

A. No; I do not think it would.

Q. Seventy-five thousand dollars?

A. Yes; that would cover it.

Q. That is, you pay fifty thousand dollars for experimental purposes?

A. Yes, sir. It would be more than that, even.

Q. Does the Elevator Company own any property except that embraced in the lease of the Railroad Company to the Elevator Company? You remember that the lease of the Railroad Company to the Elevator Company includes certain machinery as well as the grounds and buildings. Does the Elevator Company own any other property? Just state the property that the Elevator Company owns or leases?

A. It owns the machinery that is under a royalty from the Philadelphia Cleaner Company, and tools, office fixtures, furniture, and so forth.

Q. The machinery which you have just described as being the machinery which you operate under a royalty from the Cleaner Company, that is the machinery which may be duplicated for \$25,000, as referred to a moment ago.

A. No. I think it would be a little bit more than that. I think the cost would be more than that.

Q. Will you just fix a figure, please.

A. I could not. It would be impossible.

Q. \$30,000?

A. I think it would cost a little bit more than that. In the neighborhood of \$35,000, I should say.

Q. \$35,000?

A. That is purely a guess. I want that understood. That is without looking into it.

Q. Will you please turn to this stipulation that was presented to-day. The first charge of \$3,976.45 specified in the stipulation under sub-heading II is the charge for

receiving, weighing and storing from cars, including first 10 days storage, is it not?

A. I do not know a thing about the figures. I assume so. I did not get this up. I do not know a thing about it.

Q. Those services are services performed by the Elevator Company?

A. If the amount of \$3,976.45 is covered by Tariff Item No. 1, it is service performed by the Elevator Company.

Q. Is receiving, weighing and storing from cars, performed by anybody other than the Elevator Company?

A. Yes, sir. As I explained a while ago, possibly some of it may have been performed by the Cleaner Company's machinery, the blowing.

Q. Does the Cleaner Company receive grain?

A. No, sir.

Q. Does it weigh grain?

A. No, sir.

Q. Does it store grain?

A. No, sir.

Q. Does it deliver grain?

A. No, sir.

Q. Those are the only items covered in that tariff?

A. As I testified, if the chief grain inspector orders it to be blown, that is included in that.

Q. If that is done, is the Cleaner Company paid three quarters of a cent a bushel?

A. I could not answer that.

Q. Will you take up Tariff Item No. 2, being "Storage each succeeding ten days or fraction thereof," and turning to the stipulation you will see the amount \$2,300.55. The receipts from that are for services performed by the Elevator Company or by the Cleaner Company?

A. By the Elevator Company.

Q. Alone?

A. Yes, sir.

Q. Take up Tariff Item No. 3, being, "Blowing, Screening or Mixing in Store (Additional)," and the amount given for that on the stipulation being \$6,335.31. What about that?

A. If that is covered by blowing, screening and mixing in store, the larger portion of it would be performed by the machinery under royalty from the Philadelphia Cleaner Company.

Q. What is that machinery? What is the nature of the service performed?

A. Blowing and screening.

Q. What is blowing and screening?

A. It is blowing air through grain to take moisture out of it or to take dust out of it. Screening is after it goes through the machinery, and certain particles are taken off of it, such as must and objectionable features of the grain, and that grain separated from the good grain.

Q. The screening is done by the Elevator Company, is it?

A. Not all of it. Some of it is. When it goes through the machinery of the Philadelphia Cleaner Company for blowing it is screened at the same time.

Q. Please go on right down through those items.

A. Item No. 4, "Turning in Store, (Additional)," \$22.14. If this amount is correct, and it is turning in store, it is done by the machinery of the Elevator Company alone.

Items Nos. 5 and 6, No. 5 being, "Drying No. 2 grade of any kind of Grain," and No. 6 being, "Sacking in lots of 1000 bushels or over, including Transfer through Elevator, and Blowing; but no storage beyond 48 hours after completion of service," representing \$22,818.59. This is performed by the machinery of the Elevator Company, and the machinery under license from the Philadelphia Cleaner Company.

Harvey C. Miller

Q. The great bulk of that service under Tariff Items Nos. 5 and 6 is performed by the Elevator Company, is it not?

A. No, sir.

Q. Why not? Will you explain how much of the service is performed by the Cleaner Company and how much by the Elevator Company.

A. The drying is largely performed by the Cleaner Company, as well as the blowing in the sacking item No. 6.

Q. All grain which is dried under Tariff Item No. 5 has first to be elevated, has it not?

A. Yes, sir.

Q. And that is service which is performed by the Elevator Company?

A. Yes, sir.

Q. And having been elevated, what does the drying consist of?

A. It consists of dropping it down through a drying machine, and then after it is dried it is put into a chamber to extract any odor that may be on it from the drying, and from there it drops into the storage bin.

Q. And, therefore, the function of the Philadelphia Cleaner Company, or the function of the machinery operated under license from the Philadelphia Cleaner Company, is confined to the machines over which the grain drops?

A. Yes.

Q. And placing it in a bin?

A. Yes, sir.

Q. The balance of the service is performed by the Elevator Company?

A. Yes, sir.

Q. Please proceed.

A. Items Nos. 7 and 8, No. 7 being, "Drying other than No. 2 grades, including Transfer through the Elevator, and Bagging, if desired; but no storage beyond 48 hours after completion of service," and No. 8 being, "Cooling,

including Transfer through the Elevator, and Bagging, if desired; but no storage beyond 48 hours after completion of service," representing \$919.26. These services are performed about the same as those under items Nos. 5 and 6.

Q. By that do you mean that the drying and cooling are performed by the machinery under license from the Philadelphia Cleaner Company, and the balance of the service performed by the Elevator Company. Is that correct?

A. Yes, sir.

By MR. TODD:

Q. Does that include the bagging? Is that done by the Elevator Company?

A. Yes, sir.

By MR. PATTERSON:

Q. Will you just take up the other charges.

A. Sub-letting leased property, \$415.

Q. That is a receipt of the Elevator Company? The Cleaner Company has nothing to do with that?

A. Nothing to do with that, no, sir.

Weighing on wagon scales, \$156.72. The Cleaner Company has nothing to do with that.

Steam heat sold to Railroad Company, \$1,605.88. The Cleaner Company has nothing to do with that.

Warehouse storage (not elevator) \$919.80. The Cleaner Company has nothing to do with that.

Charges at one-quarter of a cent per bushel, \$53.57. I do not know whether the Cleaner Company has anything to do with that or not.

Received from wagons at one-half cent per bushel, \$3.19. The Philadelphia Cleaner Company has nothing to do with that.

Received from wagons at one cent per bushel, \$35.22.

The Philadelphia Cleaner Company has nothing to do with that.

Transferring lading of car for Railroad Company, \$5.00. The Cleaner Company has nothing to do with that.

Clipping oats, \$585.95. The Cleaner Company has nothing to do with that.

Cleaning grain, \$7.05. I could not tell what that is.

Treating grain, \$2,119.46. That would be performed entirely by the Philadelphia Cleaning Company.

Q. Of course, all that grain must have been elevated also?

A. Yes, sir.

Q. And to that extent the machinery of the Elevator Company was used in respect to that grain?

A. Yes, sir.

Cooling grain, \$9.77. That is performed by the machinery of the Philadelphia Cleaner Company.

Shelling grain, \$46.92. That is performed by the machinery of the Cleaner Company.

Carting, \$1.25. I do not know anything about that.

Q. Obviously, carting had nothing to do with the Cleaner Company?

A. I am sure the Cleaner Company had nothing to do with that.

Drying grain, \$2,159.70; drying grain at one cent per bushel, \$511.14; drying grain at two cents a bushel, \$39.50; and drying grain at five cents per bushel, \$23. All these services are performed by the machinery of the Philadelphia Cleaner Company.

Q. And the machinery of the Elevator Company?

A. The machinery of the Elevator Company did not do any of this work. It is true, it is elevated before it is done, if that is what you mean.

Q. That is what I do mean.

A. Yes, sir; that is right.

Cracking, \$852.01. That is performed by the machinery of the Elevator Company.

Q. As to this grain in these last four items, there was nothing paid additional for elevation?

A. No, sir. If that grain was ordered in the elevator in order to treat it after the elevation, he did pay an elevation.

By MR. TODD:

Q. Just explain that.

A. If this grain was ordered in the elevator, and for some reason after it was in the elevator—

Q. That is, after it got into the storage bins?

A. Yes, sir. If for some reason after it is in the storage bins the owner of the grain orders it to be dried or cooled, in that case he has paid an elevation.

By MR. PATTERSON:

Q. He has paid?

A. Yes, sir. There is an elevation charge collected in addition to this charge.

Q. Apropos of these last four items that you have spoken about, drying grain, does not the Elevator Company own a dryer?

A. Yes, sir; they own part of it. They own the steam pipe part of it.

Q. Didn't it lease a dryer from the Pennsylvania Railroad Company, and is not that included in the lease?

A. Did not who lease a dryer?

Q. Did not the Elevator Company lease from the Pennsylvania Railroad Company a dryer?

A. No. There is a dryer there, that they put there, yes, sir. I should say that they leased that.

Q. It is embraced within the lease?

A. Yes, sir.

Q. Was not that the dryer which was used in connection with these last four items?

A. Possibly some of it. But that dryer could not do the work under any circumstances. It would have to embrace the machinery of the Philadelphia Cleaner Company.

Q. Why?

A. Because the grain is not dried when it is through there. It only makes it hot.

By MR. TODD:

Q. It goes through the steam process?

A. That is it. It is simply a heating process. That is not any patented machine at all.

By MR. PATTERSON:

Q. Does the statement you just made apply also to Tariff Item No. 5, which is, "Drying No. 2 grade of any kind of grain"?

A. Yes, sir.

Q. The Railroad Company has leased also a screener to the Elevator Company?

A. Yes, sir; for the purpose of sifting material out of grain to go in the dryer, so that no large obstacles will get in. There is no charge for that at all. It is simply to save large particles from getting in the machine and damaging it.

By MR. TODD:

Q. What machinery?

A. Getting into the machinery of the Elevator Company, different parts of the Elevator Company.

By MR. PATTERSON:

Q. You spoke about Tariff Item No. 1, about the chief grain inspector directing the blowing of the grain. Is there any grain inspector at the Elevator, or has there been?

A. Yes, sir.

Q. Who is he appointed by?

A. In the Elevator did you say?

Q. At the Elevator.

A. Yes, sir.

Q. Who is he appointed by?

A. The Commercial Exchange.

Q. Was he there from March 1st, 1909, to May 1st, 1910?

A. Yes, sir; he was.

Q. And it was at his direction that this blowing was given?

A. Yes, sir.

Q. The power for all these services that are performed up there at the Elevator, whether performed through the machinery of the Cleaner Company or the machinery of the Elevator Company, is furnished by the Elevator Company?

A. Yes, sir; what it requires.

Q. Of course, in offering to the consignee any of these services in which the machinery of the Cleaner Company is used, the grain must first be elevated to the top of the building by the Elevator Company?

A. Yes, sir.

Q. And then dropped by gravity?

A. Yes, sir.

Q. And the services of the Cleaner Company consist really in the passage of the grain through certain machines? Is that a correct technical expression?

A. Fairly correct.

Q. And the blowing of some cold air on it?

A. Well, yes. That is partially described.

Q. How could it be completed?

A. Do you mean how could your question be completed?

Q. How could your answer be completed? Just state for the information of the Referee what the Philadelphia Cleaner Company is. What is the machinery? What does it do?

A. It restores off-grade grain to its original grade, by drying and by removing the portion of it that is objectionable.

Q. How does it do it?

A. By subjecting it to different machines and a rubbing process, drying first. That is, air drying; not steam drying. The grain is damp, moist, and in putting it under a microscope you will find that it contains something like whiskers, and that has an odor, and that won't let go until it becomes dry, and the first process is to put it in and to pump air through and dry it, and then subject it to the different machinery, and that removes it.

By MR. TODD:

Q. It is polishing, is it not?

A. Polishing, yes, sir. In other words, it is like a child with a dirty face. It is cleaned and restored to its original grade.

By MR. PATTERSON:

Q. Under Tariff Item No. 1, if this blowing does not take place you make the same charge as if it did take place?

A. Yes, sir.

MR. TODD: I move to strike from the record all of the testimony of Mr. Miller taken at this meeting.

(Motion overruled.)

(Exception noted for plaintiff, by direction of the Referee.)

(Without waiving, but insisting upon, the objections made to this testimony, Mr. Todd cross examines the witness on the subject of his examination.)

CROSS-EXAMINATION

By MR. TODD:

Q. What rent did the Elevator Company pay to the Railroad Company for the use of its elevator and machinery from March 1st, 1909, to April 1st, 1910?

A. At the rate of \$6,000 per annum.

Q. What services did the Elevator Company render to the Railroad Company in addition to loading and unloading of the cars and elevating the grain into the storage bins of the Elevator?

A. The collection of freights, proper delivery of all goods entrusted into the care of the Elevator Company—

Q. Did it include efforts to secure for the defendant company traffic controlled by the plaintiff company?

A. Yes, sir.

Q. And the issuance of warehouse receipts for grain and merchandise?

A. Yes, sir.

Q. And the indemnification of the defendant from all manner of liability on account of the acts of the plaintiff in respect to grain and merchandise received by it?

A. Yes, sir.

Q. And the insurance on the property contained in the elevator and warehouse?

A. Yes, sir.

Q. And the performance of the duties of agency generally at that point in connection with the Elevator?

A. Yes, sir. In the collection of freight, whatever that may be. I am not familiar with the duties of an agent exactly.

Q. What difference was there, if any, in the services rendered by the Elevator Company to the Railroad Company after March 1st, 1909, and prior to that date?

A. No difference.

Harvey C. Miller

Q. What difference was there on the Tariff charges, if any, prior to March 1st, 1909?

A. No difference.

Q. The tariff that went into effect upon which you have been interrogated to-day is under date of April 17th, 1907, is it not?

A. Yes, sir.

RE-DIRECT EXAMINATION

By MR. PATTERSON:

Q. The collection of freight for the Railroad Company, of course you only collected bills that are not on the accommodation list?

A. Yes, sir. We do collect some, but not very much. As a rule, we collect from the people who are not on the credit list. But we have got to find out who they are before we make a delivery, which pretty near is the same thing.

By MR. TODD:

Q. You mean you have got to find out whether they are on the credit list or not?

A. Yes, sir. We have got to call up the Railroad Company and ask them if they are on the credit list. They change.

By THE REFEREE:

Q. How often do they change?

A. As often as a man's financial standing is changed. We find that out ourselves, and it is up to us to find it out, and we do find it out.

By MR. PATTERSON:

Q. The services that you primarily do is the unloading of the cars, or the Elevator Company performs, for the Railroad Company? That is the bulk of the work, is it not?

A. Well, I should say it is. The most expensive end of it.

Q. And the unloading of cars in connection with grain is what is technically called "elevation"?

A. Yes, sir.

Q. And you unload certain package freight also?

A. Yes, sir.

Q. Like flour?

A. Yes, sir.

Q. And that goes to the so-called warehouse which is embraced in the lease to the Keystone Elevator and Warehouse Company?

A. That is correct.

ROBERT C. WRIGHT, heretofore sworn, recalled and examined and testified as follows:

By MR. PATTERSON:

Q. Your former testimony, as I have read it, is not very clear on the subject of the right of the owner of the carload grain to demand that the Railroad Company shall unload the same under the freight tariff. Please state what the freight tariff provides?

A. The tariffs provide, through the official classification, in a general way, Rule 8-B, that owners shall be required to load and unload all freight carried at car load rates. There is an exception to that rule at certain large points, Philadelphia among them, which states that carriers will load and unload package freight carried at car load rates. Under that exception the package freight is handled at the warehouse of the Elevator Company. But grain in bulk freight does not come under that exception, but returns to the general rule that owners shall be required to load and unload it.

Q. Then, under the freight rate on this grain which has come to Philadelphia and gone into the Elevator is the

Railroad Company obliged, under the tariffs, to unload that freight?

A. On the contrary, it is not allowed, under the tariffs, to unload that grain. The charge does not include it.

Q. The freight charge does not include it?

A. It does not include the loading and unloading of the traffic.

Q. And the Railroad Company has provided, at an additional charge, a method of loading and unloading grain?

A. Yes, sir.

Q. That method being what?

A. By local elevator.

Q. And there is a separate charge for that service which is set out in the tariffs of the company?

A. The Elevator tariffs, as they are called.

CROSS-EXAMINATION

By MR. TODD:

Q. If the tariff called for a \$50 payment for a carload of grain from point A to North Philadelphia what service would that include to the owner of the grain?

A. It would include transportation after the car was loaded by the owner at the point of shipment to a placement for delivery to the owner at the point of destination.

Q. That would mean put upon a side track?

A. Put upon a delivery track, so called. Either the owner's private track, or a public delivery track in a railroad yard.

Q. Or to an elevator?

A. To a place alongside an elevator. To a placement for delivery.

Q. You would consider a delivery of a carload lot to the elevator in North Philadelphia as a performance of the contract for transportation?

A. When you say, "to the elevator," I mean a placement on the elevator track, accessible.

Q. I mean in the elevator.

A. No. Not the unloading of the car.

Q. Don't you deliver the car actually on the Elevator tracks in the Elevator?

A. Put it on the Elevator track.

Q. Don't you put it in the Elevator?

A. How do you mean? On the track inside, within the confines of the Elevator?

Q. Yes.

A. We might do that, yes. But not to put the grain in the Elevator. Just the car containing the grain.

Q. Would you put the car containing the grain inside the elevator?

A. It is the same to us, either put it inside or any other track.

Q. And your charge for freight is a charge for hauling it from Point A and delivering it on the track inside the Elevator?

A. Delivering it on the Elevator track, at any point they designate.

Q. And then the consignee pays the charge for elevating?

A. For unloading the car. We are through with it then, and under the tariff of the Elevator Company various services are prescribed, which the consignee pays, or the owner, depending on what he wants.

Q. The tracks are your tracks, are they not?

A. Yes.

Q. If the consignee saw fit not to unload, he could let the grain rot there, could he not?

A. Yes. After the car is placed at the point of delivery, it becomes the property of the consignee at that point. As a matter of practice, we would not let the car stay there

forever. We would send it somewhere and dispose of the grain temporarily, at his risk and cost.

Q. Would your demurrage rules apply to that?

A. They would when the consignee does not unload or order it unloaded. When it is held in the car at the order of the consignee the demurrage charge would certainly apply.

Q. Why do you bother, then, with the question of unloading these cars through the elevator? Why don't you let the people getting grain here in Philadelphia get it out the best way they can?

A. We have the elevator as a facility to make our service attractive.

Q. You are under no obligation to furnish any such service?

A. No; I do not believe we are.

Q. It is a mere gratuity?

A. It is like a well located freight station. It is attractive to the user of transportation.

Q. Then, out of an abundance of consideration for the citizens of Philadelphia, the Pennsylvania Railroad provides an elevator which they allow the public to use without charge? Is that it?

A. I would not say they allow the public to use it without charge.

Q. You are not bound to furnish such an elevator? That is your position, as I understand it?

A. I will leave that for our counsel to state. As far as I am aware, we are not bound to furnish a facility of that kind, a special facility.

Q. But you do so so as to make it attractive to people who have grain for sale to take it to the Philadelphia market? Is that it?

A. Over our lines.

Q. All your tariffs, both freight and tariffs that are fixed for the use of this elevator, are directed with an eye

115

Harvey C. Miller

single to the purpose of making it an earning power for the carrying company, are they not?

A. That is the principle. Subject to our duties as public servants.

Adjourned until Monday, July 14th, 1913, at 2:30 o'clock P. M.

Meeting held at the office of G. Heide Norris, Esq., Referee, Land Title Building, Broad and Chestnut Streets, Philadelphia, Pa., Monday, July 14th, 1913, at 2:30 P. M.

Present:

G. HEIDE NORRIS, Esq., *Referee*.

M. HAMPTON TODD, Esq., *for the Plaintiff*.

GEORGE S. PATTERSON, Esq., and

JOHN HAMPTON BARNES, Esq., *for the Defendant*.

HARVEY C. MILLER, recalled, as under further cross-examination.

By MR. PATTERSON:

Q. Referring to this question of blowing grain incidental to refining and clarifying in No. 1, explain what the circumstances are?

A. Whenever grain is not in condition to put with other grades of grain, and can be made so by blowing, the Chief Grain Inspector orders it blown, so it may be put in the regular grades.

Q. Who is the Chief Grain Inspector, what is his name?

A. The Chief Grain Inspector of the Commercial Exchange of Philadelphia.

By MR. TODD:

Q. He is an officer of the Commercial Exchange?

A. He is employed. In that way grain can be clarified promptly and the Elevator Company can put it with other grain.

By MR. PATTERSON:

Q. This is done for the benefit of whom?

A. For the Elevator and the Railroad Company.

Q. The consignee cannot demand it be done?

A. No, sir, under no circumstances.

Q. Nor does the Railroad Company pay the Cleaner Company when grain is blown under those circumstances?

A. No, sir.

Q. The great bulk of the shipments that are handled by the Elevator and Warehouse Company are in grain, are they not?

A. Yes, sir.

Q. Over 95 per cent?

A. I do not know the exact figure.

Q. Over 90 per cent? What I want to get is the business through the warehouse is infinitesimal. The package freights which are handled by the warehouse are infinitesimal?

A. I do not know what that would amount to; I think possibly one hundred cars a month.

Q. Of what?

A. Of flour and hay and straw and merchandise.

Q. How many cars of grain?

A. Five hundred to six hundred. That is guessing on that

By MR. TODD:

Q. That is your best estimate, according to your best recollection, is it?

A. Yes, sir.

Q. At this time?

A. Yes, sir.

Q. Mr. Patterson asked you about a grain blower or grain dryer that was at the elevator. Is that included in the machinery leased with the elevator, or was it a part of the cleaner company?

A. It was originally installed by the Cleaner Company, and afterwards moved out into a building, on account of the insurance department, and the Railroad Company moved it, and put some addition to it and they put that in their estimate of their machinery. I see I signed that for some reason. Therefore they claimed they own that, but the patents—

By THE REFEREE:

Q. The part that was leased?

A. Yes, sir, the patents and the machinery belong to the Philadelphia Cleaner Company.

By MR. TODD:

Q. As I understand it it was constructed, to be used by the Cleaner Company, and embodies the patents which the Cleaner Company are authorized to use. Is that right?

A. Yes, sir.

Q. But it was then, after being installed by the Cleaner Company, moved by the Railroad Company, some minor additions made to it, and you signed a document admitting it belongs to the Elevator Company?

A. To the Railroad Company, yes, sir.

By THE REFEREE:

Q. Part of the inventory under the property leased?

A. Yes, sir, that is it, exactly.

By MR. PATTERSON:

Q. Did the Railroad Company pay for that dryer,

pay the Cleaner Company for that dryer when it was put in the building?

A. No, sir, the first one they did not, but when the Cleaner Company moved, or when the Railroad moved it, they did then, they paid for the moving and an additional portion of the dryer was put up.

Q. Did not they pay you some \$20,000 for it?

A. No, sir, that was the building—

By MR. TODD:

Q. What was?

A. The Railroad Company put the additional building for that dryer, a house; the Insurance Company would not permit it to be any longer in the elevator but they put a large building up and a conveyer, and extra elevator in the elevator, to elevate the grain, I think amounting to something like twenty odd thousand dollars on the building. I think I contracted for it. I think the railroad asked me to let the contract.

By MR. PATTERSON:

Q. The railroad paid that?

A. Yes, sir, paid that.

CARROLL M. BUNTING, having been duly sworn, was examined as follows:

By MR. PATTERSON:

Q. What is your business?

A. Comptroller of the Pennsylvania Railroad.

Q. How long have you been employed by the Railroad Company?

A. Since about 1890.

Q. How many years have you been engaged in work in connection with the accounts of the Railroad Company?

A. Practically since that time.

Q. Is it part of your duties to be familiar with the accounts kept by the Pennsylvania Railroad with other Railroad Companies?

A. Yes, sir.

Q. Are you engaged in any outside work, outside of your duties as an Officer of the Pennsylvania Railroad Company, in connection with the question of accounting?

A. Yes, I am President of the Association of the American Railway Accounting Officers, and Chairman of their Executive Committee, and I am a member of the Committee of Twenty-five, which has general charge of all corporate, general and fiscal accounts that are compiled by that Association in conjunction with the United States Government.

Q. In what Department of the United States Government are you engaged in conjunction with or in connection with these accounts?

A. The Inter-State Commission.

Q. It has appeared in the testimony in this case that the receipts of the Elevator Company are derived first from certain payments made by the Railroad Company for service performed, secondly receipts from consignees and the owners of property for services which have been performed exclusively by the Elevator Company, without the use of the patented process of the Cleaner Company, and third the receipts which are derived from services rendered both by the machinery and employes of the Elevator Company solely, and also by the use of certain machines, the right to use which has been acquired by the Elevator Company from the Cleaner Company. Have you before you a statement of those receipts as they appear in the record in this case?

A. I have, yes.

Q. Those receipts appear from stipulation filed by Mr. Todd and myself in the testimony in this case?

A. They do.

Carroll M. Bunting

Q. And the nature of the various services performed for consignees has been testified to at length by Mr. Miller?

A. It has.

Q. What part of the gross receipts of the Elevator Company can be ascribed to services performed by the Elevator Company, without the use of the patented process of the Cleaner Company?

MR. TODD: Objected to, first, the inquiry does not tend to develop any relevant fact to the issue involved in this case. Second, I assume that Mr. Bunting is called as an expert, to make deduction from the facts and testimony already presented before the Referee, and therefore I object to his doing so, as usurping the province of the Referee in the first instance; that the Referee, or the Court, are just as able, and more able to pass upon that question than Mr. Bunting would be, and his swearing to it is not half as important or as efficacious or persuasive as the statement of counsel to the Referee of the same fact. And the further objection that the subject of the inquiry is not the subject matter of expert testimony.

THE REFEREE: I will over-rule the objection, and admit the testimony.

(Exception noted for plaintiff.)

By MR. TODD:

Q. Have you any special facilities for passing on this question, that any other person familiar with figures could not pass upon?

A. How do you mean?

Q. I mean just what I say.

A. I only have the facilities of my knowledge and experience in the matter. That is all.

Q. What knowledge and experience do you mean, what you have been familiar with for twenty-five years?

A. That is all.

Q. You have examined those figures. Is there anything that anybody familiar with the ordinary mathematics, or the rule of three, cannot do as well as you?

A. After I get through I think anybody else can take it.

Q. Could anybody before you do it?

A. I should not think so.

Q. In what particular does it require abstruse mathematics to pass on this question?

A. It is not abstruse mathematics.

Q. What is it that needs your particular assistance as an expert; what is the thing you deem yourself an expert upon that is necessary to elucidate these figures?

A. I do not think I said I was an expert.

Q. Don't you claim to be an expert?

A. I claim to be an accountant, yes, sir.

Q. And not an expert one?

A. I do not say I am an expert accountant, no, sir.

MR. PATTERSON: He is a railroad accountant, thoroughly familiar with the division of receipts.

THE WITNESS: I do not claim to be an expert accountant in the accepted sense of the term that I make my business or do all kinds of accounting. I claim to be a railroad accountant, like Price, Waterhouse and Company. I presume I am an able one, or they would not have made me Comptroller.

THE REFEREE: I am inclined to think on this question, whether there is sufficient ground for expert testimony here, you had better go into that a little further.

By MR. PATTERSON:

Q. Are there any instances of railroad business in which the receipts for joint service performed by two or more transportation companies are concerned are apportioned as between those companies?

A. Oh, yes, we have a great many matters of that kind.

Q. Are you familiar with the method of apportionment as used in those cases?

A. Very.

MR. PATTERSON: That is what I propose to ask him.

By MR. TODD:

Q. That is based upon mileage, is it not?

A. No.

Q. Mileage plus tariff?

A. Plus what?

Q. Tariff, mileage plus rate?

A. I never heard of such a division.

Q. How do you distribute?

A. I do not see how you could.

Q. How do you distribute your earnings on a ton of freight, hauled from Bethlehem to Trenton that is sent over two roads; how do you distribute it, what is it based on?

A. It is based generally on a percentage.

Q. How is that percentage reached?

A. That percentage is generally reached by first taking the cost of the movement and the handling at the terminal over each division.

Q. Who fixes that percentage?

A. It is generally fixed by the Accounting Department.

Q. It is fixed by agreement, is it not, between the two roads?

A. It has to be, or it would not go.

Q. After it is fixed by agreement between the two roads, you make distribution of it, based upon the percentage that each one is entitled to?

A. Undoubtedly, yes, sir.

Q. And that is nothing more than a division or multiplication is it not?

A. That is all that is, yes, sir.

By MR. PATTERSON:

Q. To bring it up to the concrete form, you have before you a tabulation made from the record in this case as to the receipts from consignees for services performed jointly by the Elevator Company machinery and by the patented process of the Cleaner Company?

A. I have.

Q. And that amounts to how much?

MR. TODD: I object. I object to the competency of this witness to make the distribution from the figures. I object to it if it is already testified to.

By MR. PATTERSON:

Q. This record shows that the receipts from the service performed both by the Elevator Company, in which the machinery of the Cleaner Company is used, amounts to \$34,989.70?

A. That is right.

Q. What amount of those receipts should be credited to the Elevator Company for services performed by them, leaving out of consideration the services performed by the Cleaner Company?

MR. TODD: That is objected to, first, because it is immaterial and irrelevant; second the question, if I understand it, is a computation that can be made by one person just as well as another; third, the witness has not shown himself to be a competent expert in connection with the distribution of earnings of an elevator.

THE REFEREE: I think that is true. I do not think you have shown enough to show that.

By MR. PATTERSON:

Q. Do you have any cases in which the railroad system is comprised of severally operated companies and the receipts from joint service are apportioned as between those companies?

A. A great many.

Q. What is the usual basis upon which that apportionment is made?

MR. TODD: Objected to as irrelevant in this case. The question under inquiry is what is a reasonable compensation for a service rendered by the Elevator Company to a carrying company.

THE REFEREE: He can answer this question.

A. The usual method of providing the revenues between the various railroad companies is to allow them, provided the lines are about of the same character, a certain amount of money based upon the proportion that the miles of one road bear to the miles of the other, plus a certain number of additional miles to represent the cost of the terminal service, which may be performed by the one company or the other. When reduced to miles, just as a matter of mathematical calculation, a distinct allowance is generally made for any terminal service performed by one company or the other, or by both, as the case may be.

By MR. PATTERSON:

Q. Assuming for the purposes of this question, that the records of the Elevator Company only show the various items which have been detailed in this stipulation, how, in your opinion, would the receipts from the joint service be divided?

MR. TODD: Objected to.

THE REFEREE: I will sustain that objection. I do not think he has shown sufficient knowledge on this particular subject.

By MR. PATTERSON:

Q. Is or is it not a fact that the receipts of joint operation are ever divided on the basis of the expense of each operation?

A. Very often it is done. As far as my experience goes it is a common method of doing it.

Q. Will you give some examples or instances of the use of that method?

A. It is almost universal between the various railroads. I suppose we have a thousand instances of that kind.

Q. Name five instances?

A. The division of earnings between the Northern Central and the Pennsylvania Railroad on the line from Philadelphia to Baltimore; the division of earnings between the Western New York and Pennsylvania on the main line with the P. R. R., the division of the Cambria and Clearfield and the P. R. R., the division between the New York Central and the P. R. R., and the United Railroads of New Jersey and the Pennsylvania Railroad.

Q. Are the operation of the various elevators which are owned either directly by the Pennsylvania Railroad, or control of the stock ownership of the Pennsylvania Company, do they come within their jurisdiction?

A. Yes, sir.

Q. Do all accounts come within your jurisdiction?

A. They do.

Q. Are you familiar with their accounts?

A. Generally speaking, yes, sir.

Q. In your opinion is that a proper basis to be applied to this case?

A. I think so, yes, sir.

THE REFEREE: That is the railroad basis?

MR. PATTERSON: No, sir; the basis of a division based upon expenses; not the mileage basis, the division based upon expenses.

THE WITNESS: It is the only division I ever knew of that was used universally.

By THE REFEREE:

Q. That is by reason of the agreement between the railroads, is it not?

A. Generally speaking it has to be by agreement, yes, sir. It could not affect unless it were an agreement. The agreement comes subsequently, generally.

By MR. PATTERSON:

Q. Applying that theory of division to these figures which you have before you, what do they show?

MR. TODD: I object to it.

By MR. PATTERSON:

Q. Will you proceed.

A. On that basis of division the Elevator Company would be allowed \$29,741.24 and the balance of \$5,248.46 would apply to the Cleaner machinery.

Q. Will you explain in detail, for the benefit of the Referee, how you make that division?

A. I first take the total expenses of the elevator, which were \$36,935.69. Deduct from that the rentals paid, because there were no rentals paid in the Cleaner plant at all, and so as to give them a basis to get the operating expenses themselves, without the inclusion of any rental, I deduct the rental of \$7,872.50. I also deducted from those expenses, the receipts of the elevator from elevation alone, which amounted to \$10,932.73; this \$10,932.73 I deducted

were the receipts exclusively shown by the Keystone Elevator and Warehouse Company during this period.

By MR. PATTERSON:

Q. You mean exclusive in the sense that the machinery of the Cleaner Company bore no part?

A. And was not used at all. I deducted this because I considered that those receipts were equivalent to about the expense, and I think I was being very liberal to the Cleaner proposition because I suppose the expenses are less than that. Anyhow I deducted them, and that left \$18,130.46 as the net elevator expense in connection with all grain handled both by the elevator and the cleaner. The expenses of the Cleaner Company were stated as \$3,169, so that I got a total expense for all grain handled both by the elevator and the cleaner machinery of \$21,299.46. I divided the receipts in the proportion that the elevator expenses bore to the cleaner expenses.

MR. TODD: I move to strike the testimony out.

THE REFEREE: The motion will be entertained.

ROBERT C. WRIGHT, recalled.

By MR. PATTERSON:

Q. At the time covered by this suit, namely between March 1st, 1909 and April 30th, 1910, did the published tariffs of the Pennsylvania Railroad Company authorize the payment of any allowance to any shipper, owner or consignee of grain, using the Keystone Elevator, or any other elevator in the City of Philadelphia, upon grain owned by such shipper, owner or consignee?

MR. TODD: I object to that testimony on the ground of its irrelevancy.

(Objection over-ruled.)

(Exception noted for plaintiff.)

Harvey C. Miller, Recalled

A. They did not.

Q. During that period did the Pennsylvania Railroad Company, in point of fact, pay any such allowances to any shipper, owner or consignee of grain, as just described?

MR. TODD enters the same objection as to the last question.

(Objection over-ruled.)

(Exception noted for plaintiff.)

A. No.

HARVEY C. MILLER, recalled.

By MR. TODD:

Q. Have you made any calculations based on the business done by the plaintiff from the first day of March 1909 to the 30th of April 1910 as to the operating expenses of the elevator, excluding grain that was brought to the elevator to be treated by the Philadelphia Cleaner Company processes?

A. Yes, sir.

Q. Will you kindly tell the Referee what it would cost a ton to have handled the grain other than that which is treated by the processes of the Cleaner Company?

A. \$1.53- $\frac{1}{2}$ a ton.

Q. Do I understand from that, that if you excluded the business that is thrown to the elevator by reason of the use of the patented processes, which you own, and which are known under the name of the Philadelphia Cleaner Company, that the handling of the other business of the elevator would cost \$1.53- $\frac{1}{2}$ a ton?

A. Yes, sir.

Q. For that time?

A. Yes, sir.

CROSS-EXAMINATION

By MR. PATTERSON:

Q. How did you arrive at \$1.53- $\frac{1}{2}$ a ton?

A. I arrived at that by taking the expense of the Elevator Company in its entirety, and deducting such labor and assistance as could be deducted, so that the elevator could be operated, and the gross expense, taking the gross expense and the amount of business handled that came there that was not treated, or rather the business that did not get attracted by the machinery of the Philadelphia Cleaner Company. That amounted to \$1.53- $\frac{1}{2}$ a ton.

Q. The total expenses of the Elevator Company, according to the stipulation were \$36,935.69. What items did you deduct from that?

A. I deducted, I cannot tell you off hand without referring to my memorandums, I only kept what men and such as were necessary to operate the elevator.

Q. Salaries \$3,050. Did you deduct that from the receipts?

A. I deducted part of that, yes, sir.

Q. How much of that?

A. I think 20 per cent.

Q. Why did you deduct \$600.00, or 20 per cent from that?

A. There would not be as much business handled and would not take quite so many men, so much attention and so many clerks.

Q. And coal?

A. Yes, sir.

Q. The item of coal in the stipulation is \$2,847.62?

A. Without referring to my memorandum, I think that is about 20 per cent.

Q. Oil?

A. The same, I think it averaged all about 20 per cent.

Q. You deducted 20 per cent from the total expenses?

Harvey C. Miller, Recalled

A. Yes, sir.

Q. Which left, according to the stipulation, approximately \$28,000?

A. I do not know what figures your are. I do not think they are the same figures I had. I took them off of Mr. Fernley's statement. These are not the first figures he got up. They have had two or three hacks at it. I took the number of tons that was handled by the Elevator Company, and many there that were not treated, and the cost of the machinery and everything. I went into detail as to how many men would be necessary to operate it, in every sense of the word.

Q. Then am I correct in understanding that your figures are based first upon an assumption as to the expenses of the elevator to unload grain which came there, which did not have any treatment?

A. No, sir, there is no assumption. I went into it very carefully. I think I am competent to say just what was necessary to operate that elevator in the way of dollars and cents under these conditions.

Q. You mean that is your opinion?

A. No, sir, it is not my opinion. It is a fact.

Q. Have you operated the elevator under those conditions during this period of time?

A. No, sir.

By MR. TODD:

Q. It is your opinion as to the proper distribution of the expense account?

A. Yes, sir, that is true.

Q. That is Mr. Patterson's question.

A. I did not so understand it.

By MR. PATTERSON:

Q. And you divided this estimated expense of the elevator by the number of tons of grain which went through the elevator, and which were not treated?

A. Yes, sir.

Q. Is it not a fact that during the fourteen months the non-treated grain amounted to 795,290 bushels out of a total of 5,527,636 bushels?

A. I cannot recall the figures. I will be very glad to get those figures some other time and give them to you.

Q. Can it be admitted that those are the figures?

A. I do not know until I look it up.

(It is stipulated between Mr. Todd and Messrs. Barnes and Patterson, that during the period covered by this suit there were 5,527,636 bushels of grain handled through the elevator of which 795,290 bushels of grain was grain not treated by the processes of the Philadelphia Cleaner Company.

By MR. PATTERSON:

Q. It then appears, does it not, from these figures, that, in arriving at your calculation of \$1.53- $\frac{1}{2}$ per ton you only deducted one-fifth from the expenses of the Elevator Company, and applied this expense to only two-thirteenths of the grain?

A. That is correct possibly, but it was the only way you could operate the elevator. You could not operate the elevator with any less men or at any less expense.

(Mr. Todd admits that Mr. Bunting is a competent accountant, and entirely competent to make a calculation of the distributions as set forth in his testimony, but he insists upon his objection that such testimony is not relevant or material, and that the subject matter is not the subject matter for expert testimony.)

Testimony closed.

EXHIBIT A

I. C. C.—G. No. 2953
 (Superseding I. C. C.—G. No. 2837)

PENNSYLVANIA RAILROAD COMPANY

NORTHERN CENTRAL RAILWAY COMPANY
 PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD
 COMPANY
 WEST JERSEY & SEASHORE RAILROAD COMPANY

TARIFF

-OF-

ELEVATOR AND OTHER CHARGES

-MADE BY THE-

KEystone ELEVATOR AND WAREHOUSE CO.

-ON-

GRAIN

-IN THEIR ELEVATOR AT-

PHILADELPHIA, PA.

-NEAR-

NORTH PHILADELPHIA STATION

PUBLISHED AND FILED BY THE PENNSYLVANIA RAILROAD
 COMPANY

Receiving, Weighing and Storing
 from Cars, including first 10 days Storage
 and Delivery to cars or wagons.. $\frac{1}{2}$ cent per bushel

Storage each succeeding 10 days or
 fraction thereof

$\frac{1}{4}$ " " "

Blowing, Screening or Mixing in
 Store (Additional)

$\frac{1}{4}$ " " "

Turning in Store (Additional) ..

$\frac{1}{4}$ " " "

Drying No. 2 grade of any kind of
 Grain

$\frac{1}{2}$ " " "

Sacking, in lots of 1000 bushels or
 over, including Transfer through Ele-
 vator, and Blowing; but no Storage

beyond 48 hours after completion of service* $\frac{1}{2}$ cent per bushel

(*Note: Subject to Storage at $\frac{1}{4}$ cent per bushel for each 10 days or fraction, beginning 48 hours after completion of service.)

GRAIN OUT OF CONDITION OR "OFF GRADE" RECEIVED FOR TREATMENT IS SUBJECT TO FOLLOWING TARIFF OF CHARGES:

Drying other than No. 2 grades, including Transfer through the Elevator, and Bagging, if desired; but no Storage beyond 48 hours after completion of service* 1 cent per bushel

Cooling, including Transfer through the Elevator, and Bagging, if desired; but no Storage beyond 48 hours after completion of service* 1 " " "

(*Note: All Grain received for Treatment subject to Storage at $\frac{1}{4}$ cent per bushel for each 10 days or fraction, beginning 48 hours after completion of treatment.)

All rates apply to car load lots unless otherwise stipulated.

All Grain in Elevator, whether on Storage or for Treatment, is invariably at owner's risk of fire, heating, weevil or other damage.

ISSUED PHILADELPHIA, MARCH 15, 1907

TAKING EFFECT APRIL 17, 1907

GEO. D. DIXON, E. P. BATES,
Freight Traffic Manager. *General Freight Agent.*

ROBT. C. WRIGHT, GEO. D. OGDEN,
General Freight Agent. *Assistant General Freight Agent.*

Reproduced 19266
(R.—G. 12387) (Record File 812) (Mailing List No. 559)
Agent's Index No. 42 (223)

138

C. P. No. 5, March Term, 1911.

No. 2319.

THE KEYSOne ELEVATOR AND WAREHOUSE COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

Sur Exceptions to Report of Referee.

By the COURT:

The plaintiff established its case by proving in the usual way that its services were reasonably worth thirty-five cents a ton, and the learned Referee found that that was a reasonable charge. The defendant did not offer testimony to contradict these witnesses, but offered to prove that one Miller owned 93.6% of the stock of the plaintiff company; that he was one of the partners in the firm of L. F. Miller & Sons, grain dealers; that he was also an owner of a patented process for cleaning grain used in the elevator of the plaintiff company; and that in all of these capacities he derived large profits. The offers are stated at length in the report of the learned Referee. The learned Referee refused to admit these offers of proof.

The Court is of opinion that in the present action the defendant cannot be permitted to go behind the corporate entity of the plaintiff company and inquire into the profits derived by that company or its stockholders from other sources. The one question to be determined by the Referee was: What were the services of the plaintiff company reasonably worth? In this action, the value of the services rendered by the plaintiff must be determined without regard to the profits which the plaintiff derives from other sources. If the plaintiff or its stockholders were operating at a loss or were deriving very small profits from their business, the services rendered by them to the defendant company would not be worth more on that account. So the fact that they are making profits in their business does not affect the value of the services rendered to the defendant. This Court must regard the present case in the same way as it would consider any other action in assumpsit to recover the value of services rendered or goods sold and delivered. It cannot attempt to fix the prices which the plaintiff ought to have charged, in any other manner than by hearing testimony from persons having knowledge of the business and of similar services and stating what the reasonable market value of such services is.

The Court has carefully considered the able report of the learned Referee and is of opinion that the exceptions thereto should be dismissed.

Endorsement: No. 2319.—M. T. 1911—C. P. No. 5—The Keystone Elevator and Warehouse Company vs. The Pennsylvania Railroad Company—*Sur Exceptions to Report of Referee—Opinion of the Court—Filed Feb. 21-1914—Mace.*

No. 2319.

KEYSTONE ELEVATOR & WAREHOUSE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

To the Prothonotary:

Assess the plaintiff's damages in the above case, as follows:

| | |
|--------------------------------------|-------------|
| Debt | \$17,551.04 |
| Interest from January 24, 1911 | 3,276.23 |
| | <hr/> |
| | \$20,827.27 |

M. HAMPTON TODD,
Attorney for Plaintiff.

Judgment will be entered by the Prothonotary for the above amount of \$20,827.27, the exceptions to the report of the master having been dismissed.

STAAKE, J. 3/5/14.

I hereby assess plaintiff's damages in the above case in the sum of Twenty thousand, eight hundred twenty-seven dollars twenty-seven cents (\$20,827.27).

JAS. W. FLETCHER,
Pro Proth'y.

Philadelphia, March 5, 1914.

Endorsement: No. 2319 March Term 1911—C. P. No. 5—Keystone Elevator & Warehouse Company vs. Pennsylvania Railroad Company.—Order for Judgment and Assessment of Damages—Filed Mar. 5, 1914—Jas. W. Fletcher Pro Proth'y.—Todd.

123.

No. 2319, March Term, 1911.

KEYSTONE ELEVATOR AND WAREHOUSE COMPANY, Plaintiff,
v.

PENNSYLVANIA RAILROAD COMPANY, Defendant.

Appeal of Defendant from the Judgment.

Appeal from Court of Common Pleas No. 5 of the County of Philadelphia.

John Hampton Barnes.

Filed March 12, 1914.

Eo die.—Certiorari exit.

Ret'ble first Monday January 1915.

April 20, 1914.—Assignments of Error filed.

June 19, 1914.—Record returned and filed.

March 16, 1914.—Petition to advance case filed.

And now, March 21, 1914, the court upon consideration of the foregoing petition order that the hearing of said appeal be advanced and fixed for hearing at the foot of list for week beginning May 4, 1914.

PER CURIAM.

May 5, 1914.—Argued.

July 1, 1914.—Judgment affirmed.

PER CURIAM.

Remittitur exit and with record sent to Prothonotary of Philadelphia Co.

September 9, 1914.—The Prothonotary is hereby directed to hold the record in the above stated case pending the disposition of a petition for the allowance of a writ of error, presented to the United States Supreme Court August 28, 1914.

PER CURIAM.

Endorsement: Docket Entries of Supreme Court.

142 In the Supreme Court of Pennsylvania for the Eastern District.

Court of Common Pleas No. 5 of the County of Philadelphia, March Term, 1911.

No. 2319.

KEYSTONE ELEVATOR AND WAREHOUSE COMPANY, Plaintiff,

THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

Enter Appeal on behalf of the above defendant from the judgment of the Court of Common Pleas No. 5 of the County of Philadelphia.

JOHN HAMPTON BARNES,
Attorney for Defendant.

To James T. Mitchell, Prothonotary Supreme Court, Eastern District.

COUNTY OF PHILADELPHIA, ss:

Lewis Neilson, Secretary, being duly sworn saith that said Appeal is not taken for the purpose of delay, but because Appellant believes he has suffered injustice by the judgment from which he appeals.

LEWIS NEILSON.

Sworn — and subscribed this 11th day of March A. D. 1914.

[SEAL.]

HENRY E. CAIN,
Notary Public.

Commission expires February 21, 1915.

Endorsement: No. 123 January Term, 1914—Supreme Court of Pennsylvania Eastern District—Keystone Elevator and Warehouse Company vs. The Pennsylvania Railroad Company—Appeal and Affidavit—Filed Mar. 12 1914 in Supreme Court—John Hampton Barnes Attorney for Appellant.

143 THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT,
City and County of Philadelphia, ss:

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas No. 5 for the County of Philadelphia, Greeting:

[SEAL.]

We being willing for certain causes, to be certified of the matter of the appeal of Pennsylvania Railroad Company, from the judgment of your said Court at No. 2319 of March Term A. D., 1911, wherein Keystone Elevator and Warehouse Company was plaintiff and the said appellant was defendant, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the first Monday of January next (1915) so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable D. Newlin Fell, Doctor of Laws, Chief Justice of our said Supreme Court, at Philadelphia, the twelfth day of March in the year of our Lord one thousand nine hundred and fourteen.

ALFRED B. ALLEN,
Deputy Prothonotary.

144 To the Honorable the Justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Eastern District:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

J. WILLIS MARTIN, *Judge.* [L. S.]

Endorsement: No. 2319 March Term, 1911—C. P. No. 5 Phila.—No. 123 January Term, 1914—Supreme Court—Keystone Elevator and Warehouse Company, v. Pennsylvania Railroad Company, Appellant—Certiorari to the Court of Common Pleas No. 5 for the County of Philadelphia—Returnable the first Monday of January

1915—Rule on the Appellee, to appear and plead on the Return-day of the Writ. Alfred B. Allen, Deputy Prothonotary—M'ch 12/14, Brought into office R. Richardson Pro Proth'y—John Hampton Barnes—Filed Jun- 19 1914 in Supreme Court.

145 Supreme Court of Pennsylvania, January Term, 1914.

No. 123.

KEystone ELEVATOR AND WAREHOUSE COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Appeal of Pennsylvania Railroad Company from the Judgment of the Court of Common Pleas No. 5 of Philadelphia County, as of March Term, 1911, No. 2319.

Assignments of Error.

First. The refusal of the Referee to admit in evidence the defendant's offers as follows (63a, 64a, 65a and 68a):—

“1. That during the time embraced within the plaintiff's statement, to wit, from March 1st, 1909, to May 1st, 1910, the 146 capital stock of the Keystone Elevator and Warehouse Company the plaintiff in this case, was 10,000 shares at \$10 each, all of which was issued and outstanding, and that during the said time 9,360 shares of said stock, at a par value of \$93,600 was the property of Mr. Harvey C. Miller.”

“2. That during the period in question, the said Harvey C. Miller was a member of the firm of L. F. Miller & Sons, who were shippers consignees and dealers in grain, and that during the period in question ninety per cent. of the business elevated, stored and handled through the elevator and warehouse of the plaintiff company at North Philadelphia, as referred to in the Statement of Claim, was grain elevated, stored and handled for and on account of the said firm of L. F. Miller & Sons, and for compensation for the elevation, storage and handling of which and the grain and merchandise of other owners and consignees through said elevator and warehouse this suit is brought, as is more specifically detailed in plaintiff's statement.”

“3. That said grain, the property of L. F. Miller & Sons and other owners, as aforesaid, and for the elevation, storage and handling of which through the Keystone Elevator this action was brought was grain which was shipped (at the tariff freight rates) from points in States other than Pennsylvania over the lines of the defendant company to said Keystone Elevator, and delivered by the defendant to the plaintiff company, who, in turn, elevated the same into the elevator and performed various services with respect thereto as more particularly detailed in the tariff hereinafter referred to.”

“4. That other grain dealers and consignees of grain, competitors of L. F. Miller & Sons, located in the city of Philadelphia received

147 grain transported over the lines of the defendant from the same points as mentioned in paragraph 3 of this offer and on which they paid the same freight transportation rate as that paid on grain of L. F. Miller & Sons, and that other grain dealers and consignees did not have any elevator nor perform any elevator service in connection with such grain, and accordingly did not receive any compensation therefor."

"5. The defendant further offers to prove from the books of the plaintiff company that the plaintiff company and the said Harvey C. Miller, as the owner of 93.6 per cent. of the capital stock of the said company, have already received by reason of the payment made by the defendant to the plaintiff as averred in the Plaintiff's Statement, and the payments made to the plaintiff by consignees and owners under the tariff (admitted in evidence) for the performance by the plaintiff of the various services agreed to be performed by the plaintiff for the defendant, and for the performance of which this action is brought, the cost of such performance, as well as a reasonable profit in addition to said cost, and that the further payment demanded by the said plaintiff company for the performance of said services is forbidden by the provisions of the Act of Congress, entitled 'An Act to Regulate Commerce,' approved February 4th, 1887, its amendments and supplements, as well as the Act of Congress entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February 19th, 1903, its amendments and supplements."

"6. A duly authenticated copy of the opinion, report and order of the Interstate Commerce Commission, decided January 7th 1913, dealing with the operation of the said Keystone Elevator by the Keystone Elevator and Warehouse Company during the period cov-

ered by this suit, as well as the lease and contract with the 148 defendant company under which the plaintiff has operated the same, and making an order against said defendant forbidding the leasing of said elevator to the plaintiff or the payment of any allowance for its services upon any property passing through said elevator or warehouse belonging to a stockholder of said plaintiff company, unless tariffs of the defendant should embrace similar privileges to all other shippers using this or any other elevator in the city of Philadelphia."

Second. The refusal of the Referee to admit in evidence the stipulation of counsel, as follows (77a):—

"And now, July 9th, 1913, it is stipulated between the parties to this cause that the books of the plaintiff company show the following for the period between March 1st, 1909, and April 30th, 1910.

I. Expenses, \$36,935.69.

"That during the same period of time the expenses of the Clearer Company were \$3,169.

II. Receipts, \$15,922.43.

"That during the same period of time the Elevator Company paid Mr. Harvey C. Miller the sum of \$335,060.08 for the right to use in said elevator certain patented processes for cleaning and otherwise

treating grain, said payment being at the rate of $\frac{3}{4}$ ¢ per bushel on all grain so cleaned or treated. July 9th, 1913."

Third. The refusal of the Referee (8a, 9a, 10a) to admit in evidence the testimony of Harvey C. Miller in answer to the question (80a) :—

"Who performed the services under item 1 of the tariff?" (Exhibit A) as follows: "Receiving, weighing, storing freight cars, including first ten days' storage and delivering to cars or wagons."

149 and to the ruling of the Referee striking out all the testimony of the said Harvey C. Miller taken at the meeting on July 9th, 1913 (10a).

Fourth. The refusal of the Referee (8a, 9a, 10a) to admit in evidence the testimony of Carroll M. Bunting, a witness called by the defendant, in answer to the question (107a).

"What part of the gross receipts of the Elevator Company account was ascribed to services performed by the Elevator Company without the use of the patented process of the Cleaner Company?"

and to the striking out by the Referee (8a, 8a, 10a) of the entire testimony of the said witness Carroll M. Bunting. (105a-114a.)

Fifth. The refusal of the Referee (8a, 9a, 10a) to admit in evidence the testimony of Robert C. Wright in answer to the question (115a) :—

"At the time covered by this suit, namely, between March 1, 1909 and April 30, 1910, did the published tariffs or the Pennsylvania Railroad Company authorize the payment of any allowance to any shipper, owner or consignee of grain, using the Keystone Elevator or any other elevator in the City of Philadelphia, upon grain owned by such shipper, owner or consignee? During that period, did the Pennsylvania Railroad Company in point of fact pay any such allowance to any shipper, owner or consignee of grain, as just described?"

Sixth. The finding by the Referee as follows (18a) :—

"In the opinion of the Referee the plaintiff has proved its case and the defendant has offered no legal defence to the payment of the balance claimed. This case is governed by the rules of 150 common law applicable to actions of assumpsit on a quantum meruit and the plea of non assumpsit, payment, etc., is not sustained by offers to prove that the largest stockholder of the plaintiff company who was also a member of a firm of grain shippers furnishing a large portion of the business to the plaintiff and who was also the owner of a patented grain cleaning apparatus, made large profits for himself and the plaintiff out of the elevator and warehouse business during the period covered by the contract."

Seventh. The finding by the Referee with reference to the Act of Congress entitled an Act to Regulate Commerce, approved February 4th, 1887, and "An Act to Further Regulate Commerce," approved February 19th, 1903, as amended by the Act of June 29th, 1906, as follows:—

"The Referee has read and carefully considered the statutes above referred to and the cases cited by the defendant, but it does not

seem to him that they have any bearing on the point in issue under the facts of this controversy." (14a.)

Eighth. The conclusion of law by the Referee as follows (22a):—

"1. That the defence set up and offered to be proved by the defendant is an insufficient answer to the plaintiff's claim."

Ninth. The order of the Court dismissing the defendant's exceptions and affirming the Report and findings of the Referee (supra, page —).

Tenth. The entry of judgment for the plaintiff.

JOHN HAMPTON BARNES,
Attorney for Appellant.

151 Endorsement: No. 123 January Term 1914—Supreme Court of Pennsylvania—Keystone Elevator and Warehouse Company vs. Pennsylvania Railroad Company, Appellant—Appeal of Pennsylvania Railroad Company from the judgment of the Court of Common Pleas No. 5 of Philadelphia County, as of March Term 1911, No. 2319.—Assignments of Error—Filed Apr. 20 1914 in Supreme Court—John Hampton Barnes Morris Building Philadelphia.

152 In the Supreme Court of Pennsylvania, Eastern District.

No. 123.

KEYSTONE ELEVATOR & WAREHOUSE CO.

v.

PENNA. RAILROAD CO.

Appeal from Court of Common Pleas No. 5, Philadelphia County, January Term, 1914.

Filed July 1, 1914.

Per Curiam.

The judgment is affirmed on the opinion of the learned Judge of the Common Pleas.

STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the Opinion in the above entitled cause, so full and entire as appears of Record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this second day of November, second, A. D. 1914.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

153 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Keystone Elevator & Warehouse Company as plaintiff in error, and The Pennsylvania Railroad Company, as defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

154 United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventh day of October in the year of our Lord one thousand nine hundred and fourteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by

MAHLON PITNEY,
*Associate Justice of the
Supreme Court of the United States.*

[Endorsed:] Supreme Court of the United States. The Pennsylvania Railroad Company, Plaintiff in Error, vs. Keystone Elevator

& Warehouse Company, Defendant in Error. Writ of Error to Supreme Court of Pennsylvania. Filed Oct. 30, 1914, in Supreme Court.

155 UNITED STATES OF AMERICA, *ss.*:

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
KEYSTONE ELEVATOR & WAREHOUSE COMPANY, Defendant in Error.

To Keystone Elevator & Warehouse Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Prothonotary of the Supreme Court for the State of Pennsylvania, wherein The Pennsylvania Railroad Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Mahlon Pitney Associate Justice of the Supreme Court of the United States, this seventh day of October, in the year of our Lord 1914.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

And now October 29th 1914 I accept service of the above citation for the Defendant-in-Error and request the Clerk of the Court to note my appearance of record for such defendant.

M. HAMPTON TODD,
*Attorney for Keystone Elevator & Warehouse
Company, Defendant in Error.*

[Endorsed:] The Pennsylvania Railroad Company, Plaintiff in Error, vs. Keystone Elevator & Warehouse Company, Defendant in Error. Citation to Defendant in Error to appear before Supreme Court of the United States. Filed Oct. 30, 1914, in Supreme Court. John Hampton Barnes, Morris Bank Building, Philadelphia, for Plaintiff in Error.

156 Know all men by these presents, That We, The Pennsylvania Railroad Company, as Principal, and American Surety Company of New York, as Surety, are held and firmly bound unto Keystone Elevator & Warehouse Company in the full and just sum of Forty-one thousand, six hundred fifty-four Dollars and fifty-four cents (\$41,654.54) to be paid to the said Keystone Elevator & Warehouse Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and our successors jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of October, in the year of our Lord one thousand nine hundred and fourteen (1914).

Whereas, lately at the Supreme Court of the State of Pennsylvania in a suit depending in said Court, between said Keystone Elevator & Warehouse Company as plaintiff, and The Pennsylvania Railroad Company, as defendant, a judgment was rendered against the said The Pennsylvania Railroad Company and the said The Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Keystone Elevator & Warehouse Company citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said The Pennsylvania Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good; then the above obligation to be void; else to remain in full force and virtue. Sealed and delivered in the presence of:

[Seal P. R. R.]

THE PENNSYLVANIA RAILROAD COMPANY,
By GEO. F. DIXON, *Vice-President.*

Attest:

ROBT. H. H. GROFF,
Assistant Secretary.

[Seal Surety Co.]

THE AMERICAN SURETY COMPANY OF NEW
YORK,
By CHARLES X. WEED, *Resident Vice-President.*

Attest:

LEO H. CARPENTER,
Resident Ass't Secretary.

[Endorsed:] Supreme Court of the U. S. The Pennsylvania Railroad Company, Plaintiff in Error, vs. Keystone Elevator & Warehouse Co., Defendant in Error. Bond on Writ of Error. (Copy.) Approved by Mahlon Pitney, Associate Justice of the Supreme Court of the United States. Oct. 13, 1914. Filed Oct. 30, 1914, in Supreme Court.

157 THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
KESTONE ELEVATOR & WAREHOUSE COMPANY, Defendant in Error.

To the Honorable the Supreme Court of the United States:

And now comes The Pennsylvania Railroad Company, Plaintiff in Error, and prays for a reversal of the judgment of the Court of

Common Pleas No. 5 for the County of Philadelphia in the action brought by Keystone Elevator & Warehouse Company against The Pennsylvania Railroad Company, defendant, which judgment was entered in the office of the Prothonotary of the said Court of Common Pleas No. 5 for the County of Philadelphia, on March 5, 1914; and it also prays for a reversal of the order of affirmance by the Supreme Court of the State of Pennsylvania entered in the office of the Prothonotary of the said Supreme Court of Pennsylvania July 1, 1914.

JOHN HAMPTON BARNES,
*Attorney for The Pennsylvania Railroad
 Company, Plaintiff in Error.*

Filed Oct. 30, 1914, in Supreme Court.

[Endorsed:] The Pennsylvania Railroad Company, Plaintiff in Error, vs. Keystone Elevator & Warehouse Company, Defendant in Error. Prayer of Plaintiff in Error for reversal of judgment entered against it by Supreme Court of the State of Pennsylvania. Filed Oct. 30, 1914, in Supreme Court. John Hampton Barnes, for Plaintiff in Error.

158 In the Supreme Court of the United States.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
 vs.
 KEYSTONE ELEVATOR & WAREHOUSE COMPANY, Defendant in Error.

Specification of Errors upon Which Plaintiff in Error Intends to Rely.

And now November 2 1914 I hereby accept service of the within specifications of errors in the above writ of error for the defendant in error.

M. HAMPTON TODD,
Att'y for Def't in Error.

John Hampton Barnes, Morris Building, Philadelphia.

159 In the Supreme Court of the United States.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
 vs.
 KEYSTONE ELEVATOR & WAREHOUSE COMPANY, Defendant in Error.

Specification of Errors upon Which Plaintiff in Error Intends to Rely.

1. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the Referee his refusal to admit in evidence the defendant's offers as follows:

"1. That during the time embraced within the plaintiff's statement, to wit, from March 1st, 1909 to May 1st, 1910, the capital stock of the Keystone Elevator and Warehouse Company, the plaintiff in this case, was 10,000 shares at \$10 each, all of which was issued and outstanding, and that during the said time 9,360 shares of said stock, at par value of \$93,600 was the property of Mr. Harvey C. Miller."

"2. That during the period in question, the said Harvey C. Miller was a member of the firm of L. F. Miller & Sons, who were shippers, consignees and dealers in grain, and that during the period in question ninety per cent of the business elevated, stored and handled through the elevator and warehouse of the plaintiff company at North Philadelphia, as referred to in the Statement of Claim, was grain elevated, stored and handled for and on account of the said firm of L. F. Miller & Sons, and for compensation for the elevation, storage and handling of which and the grain and merchandise of other owners and consignees through said elevator and warehouse this suit is brought, as is more specifically detailed in plaintiff's statement."

"3. That said grain, the property of L. F. Miller & Sons and other owners, as aforesaid, and for the elevation, storage and handling of which through the Keystone Elevator this action was brought 160 was grain which was shipped (at the tariff freight rates) from points in States other than Pennsylvania over the lines of the defendant company to said Keystone Elevator, and delivered by the defendant to the plaintiff company, who, in turn, elevated the same into the elevator and performed various services with respect thereto as more particularly detailed in the tariff hereinafter referred to."

"4. That other grain dealers and consignees of grain, competitors of L. F. Miller & Sons, located in the City of Philadelphia received grain transported over the lines of the defendant from the same points as mentioned in paragraph 3 of this offer and on which they paid the same freight transportation rate as that paid on grain of L. F. Miller & Sons, and that other grain dealers and consignees did not have any elevator nor perform any elevator service in connection with such grain, and accordingly did not receive any compensation therefor."

"5. The defendant further offers to prove from the books of the plaintiff company that the plaintiff company and the said Harvey C. Miller, as the owner of 93.6 per cent of the capital stock of the said company, have already received by reason of the payment made by the defendant to the plaintiff as averred in the plaintiff's statement, and the payments made to the plaintiff by consignees and owners under the tariff (admitted in evidence) for the performance by the plaintiff of the various services agreed to be performed by the plaintiff for the defendant, and for the performance of which this action is brought, the cost of such performance, as well as a reasonable profit in addition to said cost, and that the further payment demanded by the said plaintiff company for the performance of said services is forbidden by the provisions of the Act of Congress entitled

'An Act to Regulate Commerce,' approved February 4th, 1887, its amendments and supplements, as well as the Act of Congress entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February 19th, 1903, its amendments and supplements.'

"6. A duly authenticated copy of the opinion, report and order of the Interstate Commerce Commission, decided January 7th, 1913, dealing with the operation of the said Keystone Elevator by the Keystone Elevator and Warehouse Company during the period covered by this suit, as well as the lease and contract with the defendant company under which the plaintiff has operated the same, and making an order against said defendant forbidding the leasing 161 of said elevator to the plaintiff or the payment of any allowance for its services upon any property passing through said elevator or warehouse belonging to a stockholder of said plaintiff company, unless tariffs of the defendant should embrace similar privileges to all other shippers using this or any other elevator in the city of Philadelphia."

2. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the Referee his refusal to admit in evidence the stipulation of counsel as follows:—

"And now, July 9th, 1913, it is stipulated between the parties to this cause that the books of the plaintiff company show the following for the period between March 1st, 1909, and April 30th, 1910.

I. Expenses, \$36,935.69.

That during the same period of time the expenses of the Cleaner Company were \$3,169.

II. Receipts, \$15,922.43.

That during the same period of time the Elevator Company paid Mr. Harvey C. Miller the sum of \$335,060.08 for the right to use in said elevator certain patented processes for cleaning and otherwise treating grain, said payment being at the rate of $\frac{3}{4}$ ¢ per bushel on all grain so cleaned or treated. July 9th 1913."

3. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the Referee his refusal to admit in evidence the testimony of Harvey C. Miller in answer to the question:

"Will you turn to Tariff Item No. 1, being, 'receiving, weighing and storing from cars, including first ten days' storage and delivery to cars or wagons.' Who performed that service?" Which answer was: "The Elevator Company." Tariff Item No. 1 is as follows:

Receiving, weighing and storing from cars, including first 10 days' storage and delivery to cars or wagons. $\frac{1}{2}$ cent per bushel and which alleged as error the ruling of the referee striking out all the testimony of the said Harvey C. Miller taken at the meeting on July 9th 1913.

4. The Supreme Court of Pennsylvania erred in dismissing 162 the assignment of error which alleged as error of the Referee the refusal to admit in evidence the testimony of Carroll M. Bunting, a witness called by the defendant, in answer to the question:

"What part of the gross receipts of the Elevator Company account was ascribed to services performed by the Elevator Company without the use of the patented process of the Cleaner Company?"

Which answer was:—

"The Elevator Company would be allowed \$29,741.24 and the balance of \$5,248.46 would apply to the cleaner machinery."

and to the striking out by the Referee of the entire testimony of said witness Carroll M. Bunting.

5. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the Referee the refusal to admit in evidence the testimony of Robert C. Wright in answer to the question:

"At the time covered by this suit, namely, between March 1, 1909 and April 30, 1910, did the published tariffs of the Pennsylvania Railroad Company authorize the payment of any allowance to any shipper, owner or consignee of grain, using the Keystone Elevator or any other elevator in the City of Philadelphia, upon grain owned by such shipper, owner or consignee? During that period, did the Pennsylvania Railroad Company in point of fact pay any such allowance to any shipper, owner or consignee of grain, as just described?"

Which answer was:

"They did not."

6. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error by the Referee his finding as follows:

"In the opinion of the Referee the plaintiff has proved its case and the defendant has offered no legal defence to the payment of the balance claimed. This case is governed by the rules of 163 common law applicable to actions of assumpsit on a quantum meruit and the plea of non assumpsit, payment, etc., is not sustained by offers to prove that the largest stockholder of the plaintiff company who was also a member of a firm of grain shippers furnishing a large portion of the business to the plaintiff and who was also the owner of a patented grain cleaning apparatus, made large profits for himself and the plaintiff out of the elevator and warehouse business during the period covered by the contract."

7. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error by the Referee his finding with reference to the Acts of Congress entitled an Act to Regulate Commerce, approved February 4th, 1887, and "An Act to Further Regulate Commerce," approved February 19th, 1908, as amended by the Act of June 29th, 1906, as follows:—

"The Referee has read and carefully considered the statutes above referred to and the cases cited by the defendant, but it does not seem to him that they have any bearing on the point in issue under the facts of this controversy."

8. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error by the Referee his conclusion of law as follows:

"That the defence set up and offered to be proved by the defendant is an insufficient answer to the plaintiff's claim."

9. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error by the Common Pleas Court its order dismissing the exceptions of the plaintiff in error and affirming the report and findings of the Referee.

10. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the Common Pleas Court its order entering judgment for defendant in error and against plaintiff in error for \$20,827.27.

164 THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.

KEystone ELEVATOR & WAREHOUSE COMPANY, Defendant in Error.

And now, July 27th 1914, it is agreed between counsel in the above case that the parts of the record proper to be included in the transcript of record to be filed by plaintiff in error in the office of the Clerk of the Supreme Court of the United States, include the following papers and documents, and no others:

Writ of error.
Copy of bond.
Citation.
Docket entries.
Præcipe for writ.
Writ.
Statement, and endorsements of rules on it.
Affidavit of Defense.
Rule to plead.
Plea.
Agreement to refer to Referee.
Acceptance by Referee and notice of meeting.
Referee's report with exceptions, disposition of same, and testimony.
Order of C. P. 5 dismissing exceptions and confirming Referee's report.
Entry of judgment.
Assessment of damages.
Certiorari from Supreme Court of Penna. to C. P. 5.
Opinion of Supreme Court of Penna. dismissing exceptions and affirming judgment on opinion of Court below.
Assignments of error.
Prayer for reversal.
Stipulation of counsel as to record.

JOHN HAMPTON BARNES,
S. E.,

*Attorney for The Pennsylvania Railroad
Company, Plaintiff in Error.*

M. HAMPTON TODD,

*Attorney for Keystone Elevator & Warehouse
Company, Defendant in Error.*

Filed Oct. 30, 1914, in Supreme Court.

[Endorsed:] The Pennsylvania Railroad Company, Plaintiff in Error, vs. Keystone Elevator & Warehouse Company, Defendant in Error. Stipulation of counsel as to composition of transcript of record on writ of error from Supreme Court of the United States. Filed Oct. 30, 1914, in Supreme Court. John Hampton Barnes, Morris Bldg, Philadelphia.

165 I, D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, That Alfred B. Allen was, at the time of signing the annexed attestation, and now is, Deputy Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this second day of November one thousand nine hundred and fourteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

D. NEWLIN FELL.

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, That the Honorable D. Newlin Fell by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this second day of November one thousand nine hundred and fourteen.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

166 STATE OF PENNSYLVANIA,
Philadel'phia County:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, Eastern District, do hereby certify that the above and foregoing is a true copy of the Record in the above entitled cause, so full and entire as appears of Record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this second day of November, A. D. 1914.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

Endorsed on cover: File No. 24,427. Pennsylvania Supreme Court. Term No. 683. The Pennsylvania Railroad Company, plaintiff in error, vs. Keystone Elevator & Warehouse Company. Filed November 5th, 1914. File No. 24,427.



4
No. 683.

FILED
APR 24 1915.
JAMES D. MAHER
OCTOBER TERM, 1914 CLERK

Supreme Court of the United States.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

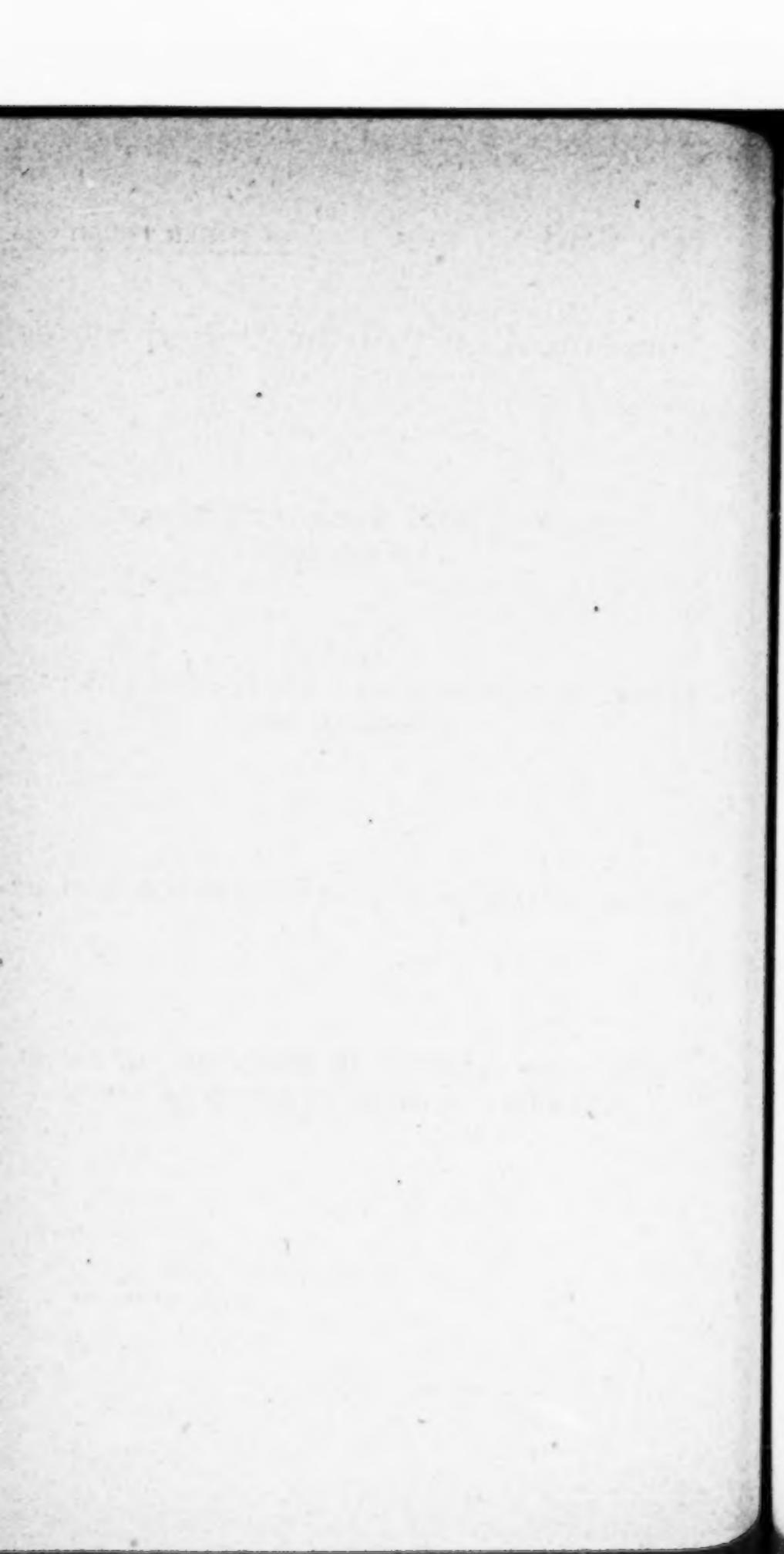
v.s.

KEYSTONE ELEVATOR AND WAREHOUSE COMPANY,
Defendant in Error.

Error to the Supreme Court of the State of Pennsylvania.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION OF
DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

JOHN HAMPTON BARNES,
Counsel for Plaintiff in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1914. No. 683.

Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Keystone Elevator & Warehouse Company, Defendant in Error.

ARGUMENT OF PLAINTIFF IN ERROR ON DEFENDANT'S MOTION TO DISMISS.

The Federal question involved in this case is whether the payment by the Railroad Company of a sum claimed by the Elevator Company, under a contract between them, is forbidden by the provisions of the Act of Congress entitled an Act to Regulate Commerce, approved February 4th, 1887, and an Act to Further Regulate Commerce, approved February 19th, 1903, as amended by the Act of June 29th, 1906.

When the petition for the writ of error was before this Court, the petitioner presented to Mr. Justice Pitney at his request a copy of the record of the case in the Supreme Court of Pennsylvania, copies of the briefs of the appellant and appellee filed therein, and a statement, signed by counsel for the petitioner, of the questions involved in the case, with particular reference to the Federal question raised

therein, and the writ of error was allowed after consideration of these papers.

The plaintiff in error contends that the rulings excluding the evidence offered raise the Federal question above stated, because the evidence was pertinent to the inquiry involved in the case as to what constitutes a reasonable compensation for the services rendered by the Elevator Company with respect to grain carried in Interstate Commerce, for which the action was brought, and that what is a reasonable compensation is under the circumstances of the case a question controlled by the provisions of the Acts of Congress to Regulate Commerce and the decisions of this Court thereon. Under these decisions, construing the Acts of Congress in respect to services which carriers may render and charge for, and payment for such services to shippers and consignees, carriers have been held liable to other shippers and consignees where the amount of such payments exceeds a reasonable compensation for the services rendered, such excess constituting an unlawful rebate or allowance and affording the basis of an action for violation of the Interstate Commerce Act.

The Railroad Company owned an elevator and warehouse in Philadelphia, and leased them to the Keystone Elevator and Warehouse Company, defendant in error, at a rental of \$6000 per annum, and employed the Elevator Company to unload the grain and merchandise, to make deliveries to the consignees, and to collect the freight, and authorized the Elevator Company to collect and retain from the consignees the charges allowed by the tariff of the Elevator Company (duly published and on file with the Interstate Commerce Commission), for elevating, storing, treating and reconditioning the grain.

The question involved in the case being what amount should be paid to the Elevator Company for the services rendered by it under the contract, the Railroad Company offered evidence to show that L. F. Miller & Sons, large shippers and consignees of grain owned 90% of the grain which passed through the elevator, that the Elevator Company received payments of large amounts for services rendered by it to the grain; that

Harvey C. Miller, a member of that firm, owned 93.6% of the total outstanding capital stock of the Elevator Company; that no payments were made to other owners of grain passing through the elevator for services rendered by them, and that the payments admitted to have been already received by the Elevator Company from the Railroad Company, as well as the said payments made to the Elevator Company by consignees and owners of grain under the elevator tariff for the performance by the Elevator Company of the various services agreed to be performed by the Elevator Company for the Defendant, and for the performance of which this action was brought, covered not only the cost of such performance, but also a reasonable profit in addition to such cost, and that the further payment demanded by the Elevator Company for the performance of said services is forbidden by the Interstate Commerce Act. The evidence offered by the Railroad Company (and which was excluded in the trial) was relevant because, while a carrier may under the provisions of Section 15 of the amendment of June 29th, 1906, to the Interstate Commerce Act, make payments to the owner of property transported for services connected with such transportation, such payments must be no more than a reasonable compensation for the services rendered. If the payments are in excess of a reasonable compensation they would be an unlawful preference, rebate or allowance prohibited by the provisions of the Act. The offer was to show the relation of Harvey C. Miller to the Elevator Company and to the firm of L. F. Miller & Sons and that the payments already made to the Elevator Company covered the cost of the performance of the service as well as a reasonable profit in addition to the cost.

The Court below held that the evidence was not admissible upon the ground that the identity of interest between the Elevator Company and Miller, a grain shipper, and the amount of the profit made by the Elevator under the payments already received, did not affect the value of the services rendered to the Defendant, and that the reasonable market value of such services must be ascertained irrespective of the amount of the profit involved.

In the *Mitchell Coal & Coke Co. vs. P. R. R. Co.*, 230 U. S., 247 (1913), the plaintiff claimed damages for discrimination alleged to result from certain per ton payments by the defendant to rival coal shippers. The defendant contended that these payments were justified on the ground that they "were made as compensation for services rendered by such shippers."

Mr. Justice Lamar, delivering the opinion of the Supreme Court said (page 254):—

"On the other hand, the defendant insisted that, though bound to haul the cars to and from the mines, it could not economically do the work on account of the physical conditions at the Altoona, Millwood and Glen White mines, and that it therefore employed those companies to perform that transportation service, paying them therefore an allowance which is *prima facie* reasonable, and must be so treated by the courts until the Commission has determined that it was excessive or constituted an unjust discrimination * * * and page 255:

"On this hearing, involving a matter of jurisdiction, we cannot pass upon these questions which go to the merits of the controversy. But these claims of the parties emphasize the fact that there are two classes of acts which may form the basis of a suit for damages. In one, the legal quality of the practice complained of may not be definitely fixed by the statute, so that *an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable.* But to determine that question involves a consideration and comparison of many and various facts, and calls for the exercise of the discrimination of the rate-regulating tribunal. The Courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been

paid. If the decision of such questions was committed to different Courts, with different juries, the result would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

Again, page 265:

"In view of this ruling it is apparent that lateral allowances might have been lawfully paid. *They became unlawful only when unreasonable.* Whether they were or not was a rate-making question as to which parties were directly at issue, and which the Courts had no jurisdiction to determine so far as it concerned the allowance to the Altoona, Millwood and Glen White mines."

Mr. Justice Pitney, although dissenting on the jurisdictional question, agreed with the Court as to the test of the legality of the allowances in question. He said:—

"The question that, as this Court now holds, must await the determination of the Commission, concerns the allowances to the Altoona, Millwood and Glen White mines; and it is in substance a mere question of fact as to whether anything, and if so, how much, ought to be allowed for certain hauling services, and the like; *if too much was allowed, the allowance was a cover for rebating; otherwise, not.*"

When the Mitchell case was before the Circuit Court, Mr. Justice McPherson, referring to the question of legality of the allowances, said (81 Fed., 410):—

"The payment of the sums complained of—fifteen cents and ten cents per ton respectively—is conceded, but the defendant explained it as mere compensation for trackage or for services rendered by the favored shippers. Whether it was such a compensation as the defendant might lawfully pay, or whether it was an unlawful rebate in disguise, was a question of fact,

and the Referee has decided it in favor of the plaintiff. With this finding I agree. There is some room for doubt in the evidence on this point, but, when all is said (and much has been ably said on behalf of the defendant), I see no sufficient reason to differ from the Referee's conclusion. The defendant made no effort to prove the money value that might properly be put upon the use of the various branches, or upon the services rendered by the locomotives of the favored shippers, and the failure to throw light upon this obviously important matter is, I think, not without significance."

The case of *Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S., 42, does not in any way qualify the principle that a railroad company can only pay a reasonable compensation to the owner of property for services rendered by such owner in connection with the transportation of property in interstate commerce, because in that case the Interstate Commerce Commission had conceded that the allowance paid to the Elevator Company barely covered the cost of the service rendered without any reasonable profit, this Court saying (222 U. S., at page 47):

"It is admitted that the three-quarters of a cent barely would pay the cost of the service rendered without any reasonable profit to Peavey & Co. for the work."

There can, it is submitted, be no doubt that if the offers of evidence had been to show that Elevator Company was the owner of the grain, and had received payment for services rendered by it to the grain, and that any further payment would constitute a violation of the Interstate Commerce Act, a Federal question would have been raised. The evidence offered by the Railroad Company which was excluded, as to the identity of interest of Miller and the Elevator Company, and the amounts paid him raised precisely these questions. There is, therefore, a Federal question involved in this appeal and the motion of the defendant in error should be dismissed.

JOHN HAMPTON BARNES,
For Plaintiff in Error.

No. 683.

Office Supreme Court, U. S.

FILED

OCTOBER 26 1915 1915

JAMES D. MAHER
CLERK

Supreme Court of the United States.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

KEYSTONE ELEVATOR AND WAREHOUSE COMPANY.

Error to the Supreme Court of the State of Pennsylvania.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO
DISMISS OR AFFIRM.

M. HAMPTON TODD,
Counsel for Defendant in Error.

NOTICE OF MOTION.

To John Hampton Barnes, Esquire,
Counsel for Plaintiff in Error.

SIR:—You are hereby notified that the within motion with brief annexed thereto will be presented to the Supreme Court of the United States on Monday the 26th day of April, 1915, at the convening of the Court.

M. HAMPTON TODD,
Counsel for Defendant in Error.

*Names of the Parties—Motion to Dismiss or Affirm—
Statement of the Case.*

In the Supreme Court of the United States.

OCTOBER TERM, 1914. NO. 683.

*Pennsylvania Railroad Company, Plaintiff in Error,
vs.*

Keystone Elevator and Warehouse Company.

MOTION TO DISMISS OR AFFIRM.

AND NOW come counsel for defendant in error in the above-entitled cause and move the Court to dismiss the writ of error herein on the ground that the Court had no jurisdiction of this case, or to affirm the judgment of the Supreme Court of Pennsylvania upon the ground that, although the record may show that this Court has jurisdiction, yet it is manifest that the writ of error was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument.

M. HAMPTON TODD,
Counsel for Defendant in Error.

STATEMENT OF THE CASE.

This is an action of assumpsit by the Keystone Elevator and Warehouse Company, the defendant-in-error, against the Pennsylvania Railroad Company, the plaintiff-in-error, to recover for terminal services.

Statement of the Case.

The Elevator Company in its statement of its cause of action (Printed Record, page 3) averred that on March 1st, 1909, an agreement was made between the Elevator Company and the Railroad Company, whereby it was stipulated that the Railroad Company should do the necessary shifting of cars to and from the elevator; that the Elevator Company would furnish at its own cost all manual labor to load and unload the cars at the elevator; to pay all operating expenses of the elevator; to act, free of charge, as agent of the Railroad Company for the collection of freight and charges on all traffic delivered to the elevator; to protect and indemnify the Railroad Company from liability on account of any acts of the elevator in respect to grain and merchandise received at the elevator and also from all liability on account of receipts for grain and merchandise issued by it; to keep all property contained in the elevator for which the Railroad Company might be held responsible, properly insured against fire. In consideration of the performance of these services, the Railroad Company agreed to pay the Elevator Company a just and reasonable sum for each ton of grain and merchandise handled by it through the elevator. That the parties acted under this agreement from March 1st, 1909, to April 30th, 1910, on which date it was terminated by mutual consent. Thereupon the Elevator Company claimed to recover from the Railroad Company as a reasonable compensation for such services the sum of thirty-five (35) cents a ton for each ton of merchandise handled by the Elevator Company during the period in question, which amounted to the sum of \$42,826. On the 24th of January, 1911, the Railroad Company paid to the Elevator Company the sum of \$28,420.19, which it admitted to be due to the Elevator Company. The Elevator Company claimed to recover the balance of its demand, namely, \$17,551.04, with interest thereon from January 24th, 1911.

The case was pleaded to issue and by agreement of the parties was tried before a referee who found in favor of the plaintiff below for the sum of \$17,551.04 with interest thereon from January 24th, 1911.

Exceptions to the referee's report were filed by the Railroad Company, defendant below, and were dismissed by the Court, and judgment entered in favor of the Elevator Company on March 5th, 1914, in Common Pleas Court No. 5 for the County of Philadelphia for the sum of \$20,827.27. The Railroad Company thereupon appealed to the Supreme Court of Pennsylvania to No. 123, January Term, 1914. After argument in that Court, the judgment of the Court below was affirmed on the opinion of the Court below dismissing the exceptions by the Supreme Court of Pennsylvania, on July 1st, 1914. (Printed Record, page 142.)

On the trial of the case before the referee, the plaintiff below proved by a number of witnesses that the reasonable value of the services rendered was thirty-five (35) cents a ton on the merchandise handled. The Railroad Company offered no testimony or proofs before the referee that the services were not reasonably worth the amount claimed, but did offer to prove that during the time covered by the claim sued on, that Harvey C. Miller owned \$93,600 out of a capital of \$100,000 of the Elevator Company; that he was a member of the firm of L. F. Miller & Sons, who owned ninety (90) per cent. of the grain handled through the elevator; that said grain had been carried in interstate commerce; that other grain dealers, competitors of L. F. Miller & Sons, located in Philadelphia, received grain carried in interstate commerce not having any elevator, performed no elevator service and received no compensation; that the payment of the amount admitted to be due (\$28,420.19) represented the cost to the elevator company of performing the services claimed for as well as a reasonable profit and that the further payment demanded by the Elevator Company is forbidden by the Acts to Regulate Commerce approved February 4th, 1887, and February 19th, 1903, and the amendments and supplements thereto; that the Interstate Commerce Commission delivered an opinion, January 7th, 1913, dealing with the operation of said elevator during period covered by this suit and made

Statement of the Case.

an order forbidding the Railroad Company from leasing the elevator in question to the plaintiff below or the payment of any allowances for its services upon any property passing through said elevator or warehouse belonging to a stockholder of the plaintiff below unless the tariffs of the Railroad Company embraced similar privileges to all other shippers using that or any other elevator in the City of Philadelphia; that the expenses of operating the elevator during the period covered by the suit was \$36,935.69; that the expenses of the Cleaner Company were \$3,169; that the receipts were \$45,922.43; that the Elevator Company paid Harvey C. Miller for the right to use his patented process for cleaning and treating grain \$35,060.08; that the tariffs of the Railroad Company showed items of charge by the Elevator Company for receiving, weighing and storing grain; that of the gross receipts of the Elevator Company \$29,741.24 were to be ascribed to services performed by the Elevator Company and the balance, \$5,248.46, would apply to the Cleaner machinery; that the tariffs of the Railroad Company did not authorize the payment of any allowance to any shipper of grain using the Keystone Elevator or any other elevator in the City of Philadelphia upon grain owned by such shipper.

These offers of proof are set forth at length in the assignments of error (Printed Record, page 146). All of these offers of proof were objected to by counsel for the plaintiff below, as being immaterial and irrelevant, which objections were sustained by the referee and his action in so doing affirmed by the Supreme Court of the State. It is contended by the plaintiff-in-error that these rulings give this Court jurisdiction of the cause.

ARGUMENT.

It is submitted there is no federal question involved in this cause.

The sole question in the cause was what were the services rendered by the plaintiff below to the plaintiff-in-error reasonably worth? This is shown by the opinion of the lower Court dismissing the exceptions of the plaintiff-in-error. This opinion will be found in the Printed Record, at page 135 (246 Pa. Rep., 336); it is as follows:

“By the COURT:

“The plaintiff established its case by proving in the usual way that its services were reasonably worth thirty-five cents a ton, and the learned Referee found that that was a reasonable charge. The defendant did not offer testimony to contradict these witnesses, but offered to prove that one Miller owned 93.6 per cent. of the stock of the plaintiff company; that he was one of the partners in the firm of L. F. Miller & Sons, grain dealers; that he was also an owner of a patented process for cleaning grain used in the elevator of the plaintiff company; and that in all of these capacities he derived large profits. The offers are stated at length in the report of the learned Referee. The learned Referee refused to admit these offers of proof.

“The Court is of opinion that in the present action the defendant cannot be permitted to go behind the corporate entity of the plaintiff company and inquire into the profits derived by that company or its stockholders from other sources. The one question to be determined by the Referee was: What were the services of the plaintiff company reasonably worth? In this action, the value of the services rendered by the plaintiff must be determined without regard to the profits which the plaintiff derives from other sources. If the plaintiff or

its stockholders were operating at a loss or were deriving very small profits from their business, the services rendered by them to the defendant company would not be worth more on that account. So the fact that they are making profits in their business does not affect the value of the services rendered to the defendant. This Court must regard the present case in the same way as it would consider any other action in assumpsit to recover the value of services rendered or goods sold and delivered. It cannot attempt to fix the prices which the plaintiff ought to have charged, in any other manner than by hearing testimony from persons having knowledge of the business and of similar services and stating what the reasonable market value of such services is.

"The Court has carefully considered the able report of the learned Referee and is of opinion that the exceptions thereto should be dismissed."

The over-ruled offers of proof were irrelevant to the issue on trial. What light would it have thrown on the issue of fact on trial to have shown that Mr. Miller was the principal stockholder of the Elevator Company, plaintiff below, and at the same time a member of the firm of L. F. Miller & Sons, who were the chief patrons of the elevator, and that the grain they dealt in had been carried in interstate commerce; or that Mr. Miller was paid royalties by the Elevator Company for a license to use his patented process for restoring grain to a marketable condition which had become out of condition by overheating or other cause; or that the Elevator Company charged the patrons of the elevator for storage and other charges in accordance with the published tariff? What interest had the Railroad Company, defendant below, in the successful or unsuccessful operations of the Elevator Company? If the Elevator Company had conducted its business at a loss, would that be any reason for recovering from the Railroad Company a larger sum of money as compensation for the services rendered than

they were reasonably worth? If this must be answered in the negative, then why must not the same answer be given if the elevator was operated at a profit? Again, what have Mr. Miller's profits or losses to do with the reasonable value of the services rendered by the Elevator Company to the Railroad Company? This may be said of every offer of proof made by the Railroad Company which was overruled and is now assigned for error. It is respectfully submitted that the Act of Congress to Regulate Commerce is not drawn in question by the offers of proof overruled in this case.

In *Lampasas vs. Bell*, 180 U. S., 276, Mr. Justice McKenna says (page 282):—

"This Court has only jurisdiction by appeal or writ of error directly from the Circuit Court in certain cases, one of which is when 'the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.' * * * But the claim must be real and substantial. A mere claim in words is not enough. We said by the Chief Justice in *Western Union Telegraph Co. vs. Ann Arbor Railroad*, 178 U. S., 239: 'When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Gold Washing & Water Co. vs. Keyes*, 96 U. S., 199; *Blackburn vs. Portland Gold Mining Co.*, 175 U. S., 571.' "

The above quotation was cited with approval in *City of Memphis vs. Cumberland Telephone & Telegraph Co.*, 218 U. S., 625.

In *Shultis vs. McDougal*, 225 U. S., 561, Mr. Justice Van Devanter, delivering the opinion of the Court, says (page 569):—

“3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, *for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.*”

In *Cook County vs. Calumet & Chicago Canal & Dock Company*, 138 U. S., 635, Chief Justice Fuller, delivering the opinion of the Court, said (page 653):—

“The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.”

In the brief of the plaintiff-in-error filed in the Supreme Court of Pennsylvania, it contended:—

“(1) That in determining what the plaintiff was entitled to recover as a reasonable compensation, the Referee should have taken into consideration evidence showing that in dealing with the Elevator Company the Railroad Company was really dealing with the owner of the property shipped, and he should therefore have considered the amounts received by Miller from the operations at the elevator during the period covered by the action.

"(2) That the amounts received by the Elevator Company for services under the tariff should have been considered as a part of the compensation received by the Elevator Company for the services rendered by it under its contract with the Railroad Company.

"(3) That the payment of any further amount by the defendant is forbidden by the provisions of Acts of Congress to Regulate Commerce."

If we understand the contention of the plaintiff-in-error correctly, it is founded on the order made by the Interstate Commerce Commission in the so-called Peavey case, which the Interstate Commerce Commission was restrained from enforcing by the Circuit Court of the United States for the Western District of Missouri, and which came by appeal before this Court and is reported under the name of *Interstate Commerce Commission vs. Diffenbaugh*, 222 U. S., 42. Mr. Justice Holmes, delivering the opinion of the Court, said (pages 45-47):—

"But the Interstate Commerce Commission had begun to change its views upon further reflection. In 1907, upon rehearing, it cut down the allowance to Peavey & Co. to three-quarters of a cent, estimating that to be the actual cost, and being of opinion that to allow any profit would be in effect to permit a rebate. 12 I. C. C. Rep., 85. The order made required the Railroad Company to desist from paying more than three-fourths of a cent per hundred pounds for service rendered in the transfer or elevation of grain at Council Bluffs or Kansas City, to any one interested in the buying, selling or shipment of grain at those places, especially naming the appellees. This is one of the orders complained of. The chief object of complaint, however, is an order made in the following year, on June 29th, 1908. In that the Commission took the last step and ordered the Union Pacific to desist from paying any

allowance to Peavey & Co. on grain in which they have any interest that is not reshipped from their elevators within 10 days, or that has been mixed, treated, weighed or inspected in any of their elevators at the above-named points. (14 I. C. C. Rep., 315.)

"The ground on which the payment to owners of grain finally was held to be a rebate had been considered from the beginning and, as we have said, had been brought to the mind of Congress. It is that when the owners of the elevators own the grain put into them they have the opportunity to perform other services to the grain in the way of treatment, or cleaning, clipping, and mixing the grain, which although not included under the term elevation or paid for by the railroad, it is an advantage to them to be able to perform at the same time. This advantage is thought to create an undue preference and unjust discrimination. Of course the opportunities for fraud are adverted to, but the ground of the decision is that even an honest payment of the bare cost of elevating grain in transit gives an undue advantage if the elevator owner also owns the grain. As was pointed out by the Court below, the final order is confined to grain that has been treated, weighed, inspected, or mixed.

"We agree with the Court below that this decision is erroneous in its conception of the grounds on which under the statute an advantage may be pronounced undue, and in its assumption that Congress has left the matter open by merely permissive words. The principle as to advantages is recognized in *Penn Refining Co. vs. Western New York & Pennsylvania R. R. Co.*, 208 U. S., 208, 221. The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he

shall pay for them. That is taken for granted in Sec. 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion, Act of June 18th, 1910, c. 309, Secs. 12, 36, Stat., 539, 551)."

Nevertheless the plaintiff-in-error contends, notwithstanding the above cited ruling of this Court, that the order of the Interstate Commerce Commission in the Peavey case, which it has been restrained from enforcing, furnishes it with a defense to the claim of the plaintiff below, to all above the actual cost of the services rendered.

The opinion of the Interstate Commerce Commission referred to in the Sixth Specification of Error (Printed Record, page 148) did not deal with the question of allowance reasonable or otherwise. On this subject, the Referee, in his report, says (Printed Record, page 32):—

"The sixth offer of defendant (to which objection was made and temporarily overruled), related to the decision and order of January 17th, 1913, of the Interstate Commerce Commission in the Keystone Elevator case. There the Commission dealt with the particular parties to this case under the contract, and the decision involved a consideration of the operation of the elevator company during the period covered by this contract, and an order was made prohibiting the making of any similar contract under like conditions for a period of two years from March 1st, 1913.

"Neither in the opinion of the Commission nor in its order referred to (made nearly three years after the services rendered had been performed), did it undertake to adjudicate upon the right of the Keystone Elevator Company to recover from the Pennsylvania Railroad Company compensation for the

services rendered between March 1st, 1909, to April 30th, 1910. The order simply prohibits future contracts or leasing under similar conditions for two years from March 1st, 1913, and in view of the decision of the Supreme Court in the Diffenbaugh case, that is probably as far as the Commission would now undertake to interfere."

In the present case it is not to be overlooked that the grain which passed through the elevator was not owned by the plaintiff below nor had it any interest in it beyond its receipt, storage and delivery. It is not alleged that the plaintiff below was not in good faith a separate entity from L. F. Miller & Sons. If we understand the position of the plaintiff in error correctly, all that it contends is that, because Harvey C. Miller was a member of the firm of L. F. Miller & Sons and was the principal stockholder in the Elevator Company and the firm of L. F. Miller & Sons was the principal customer of the Elevator Company and thereby Mr. Miller derived a profit which other grain dealers in Philadelphia did not have the opportunity of obtaining, the Railroad Company were forbidden from paying the Elevator Company more than the bare cost of performing the service.

It is respectfully submitted that this contention does not draw the act of Congress to regulate commerce in question, but, for the sake of argument, let it be conceded that it does. Then we respectfully submit that the proposition is so frivolous that under the ruling of this court in *Interstate Commerce Commission vs. Diffenbaugh, supra*, there is no need for further argument, and the judgment should be affirmed and because it is manifest that the writ of error was taken for delay only.

M. HAMPTON TODD,
Counsel for Defendant in Error.